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Current Legislation and Decisions

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CURRENT LEGISLATION AND DECISIONS

NOTES

Securities — Rule 10b-5 — Insider Fraud

Plaintiff-stockholders of Atlas Corporation (Atlas) sued, on behalf of themselves and derivatively on behalf of the corporation, alleging a breach of common law fiduciary duty and a violation of the anti-fraud provision, Rule 10b-5, under the Securities Exchange Act of 1934. Pursuant to an agreement by which Hughes Tool Company (Toolco) was to purchase Atlas' common stock interest in Northeast Airlines, Inc., a proxy statement was mailed by Atlas to its stockholders to obtain the necessary approval for the sale. Stockholder approval was obtained and Atlas transferred its interest in Northeast Airlines, Inc. in consideration of $5,000,000. Plaintiffs alleged that the proxy statements failed to disclose that Howard R. Hughes, one of the defendants and sole shareholder of Toolco, dominated Atlas' Board of Directors, that the sale was not negotiated at arms length, and that inadequate consideration was received. Summary judgment was originally granted for defendants in the District Court, and plaintiffs moved for reargument. *Held, granted*: and upon reargument, summary judgment for defendants denied. The shareholder who has a cause of action for breach of fiduciary duty in connection with a securities transaction by his corporation, may pursue his remedy under 10b-5, notwithstanding the fact that he is not a purchaser or seller of securities. *Entel v. Allen*, 270 F. Supp. 60 (S.D. N.Y. 1967).

Prior to the enactment of the general anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, Section 10(b) and Rule 10b-5 promulgated thereunder, defrauded investors had to rely on the remedies provided at common law[1] or the Blue Sky Laws of the state. Recognizing the many difficulties of proof and procedure[2]

[1] *See, e.g.*, Strong v. Repide, 213 U.S. 419 (1909) where the court followed the decisions of Stewart v. Harris, 69 Kan. 498, 77 P. 277 (1904) and Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232 (1903) in holding that "by reason of *special facts* [fraudulently concealed facts affecting the value of the stock] a fiduciary duty between director and shareholder may exist." *Contra*, Tippecanoe County v. Reynolds, 44 Ind. 509 (1904) where it was held that no relationship of a fiduciary nature exists between a director and a shareholder of a business corporation. *See also*, 3 L. Loss, SECURITIES REGULATION 1430-44 (2d ed. 1961) [cited hereafter as Loss].

[2] Procedural advantages of the federal system over state common law actions include: exclusive jurisdiction (when the actions are founded on the Exchange Act), broad venue provisions (along with extraterritorial service of process), and no requirement of posting security expenses as in the state action (McClure v. Borne Chem. Co., 292 F.2d 824 (3d Cir. 1961)). For the advantages of the burden of proof in the federal system, see Loss 1435 where it is stated: "the fact is that the courts have repeatedly said that the fraud provisions in the SEC acts . . . are not limited to circumstances which would give rise to a common law action for deceit." *See also*, A. BROMBERG, SECURITIES LAW FRAUD: SEC RULE 10b-5, [hereafter cited as BROMBERG], ch. 8 (McGraw-Hill 1967); Wettach, *Securities Regulation—Rule 10b-5-A Federal Corporations Law?*, 43 N. CAR. L. REV. 637 (1965); Notes 18-29 *infra*.

connected with common law fraud, Congress sought to provide a more flexible cause of action for the protection of "those [investors] who do not know market conditions from the overreachings of those who do."[3] Against this background there was enacted the 1933 Securities Act which provided, *inter alia*, a remedy for defrauded purchasers of securities,[4] and the 1934 Securities Exchange Act which made unlawful fraudulent sales or purchases by dealers in over-the-counter transactions.[5] In addition, Section 10(b) of the latter Act granted the Securities Exchange Commission the rule making power necessary to prevent manipulative and deceptive devices in connection with a purchase or sale of securities. However, there was a "serious gap" in the anti-fraud scheme in that a purchaser of securities could use fraudulent practices with complete immuity.[6] As a means of closing this "loophole,"[7] the Securities Exchange Commission in 1942 promulgated Rule 10b-5 pursuant to Section 10(b) of the 1934 Act. Basically, Rule 10b-5 prohibits use of interstate commerce, mails or facilities of a national stock exchange[8] to (1) employ any scheme to defraud,[9] (2) make any untrue statement or omit to state a material fact necessary to make any statement made not misleading, or (3) do anything which would operate as a fraud or deceit upon a person, in connection with the sale or purchase of a security.[10] At first glance, the Rule might be viewed as just another weapon in the SEC's arsenal.[11] Such, however, is not the case, because in 1946 implied civil liabilities under Rule 10b-5 were recog-

[3] Charles Hughes & Co. v. SEC, 139 F.2d 434, 437 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944).

[4] Securities Act of 1933 § 17(a), 48 Stat. 84, 15 U.S.C. 77q(a) (1964).

[5] Securities Exchange Act of 1934 § 15(c) [now § 15(c)(1)], 48 Stat. 895, 15 U.S.C. § 780(c)(1) (1964).

[6] *See*, Loss 1426 where it is stated: "Even after the 1938 amendments, however, there was still nothing in the acts or rules which covered fraud in the *purchase* of securities by persons *other than* over-the-counter brokers and dealers. This was a serious gap, because an issuer itself, or an officer or director or principal stockholder, could buy in its securities by fraudulent practices without being touched by federal authority. . . ."

[7] SEC Release No. 3230 (21 May 1942) stated that there was a "loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." *See generally*, Latty, *The Aggrieved Buyer or Seller or Holder of Shares in a Close Corporation Under the S.E.C. Statutes*, 18 LAW & CONTEMP. PROB. 505, 514 (1953); Comment, *Securities Regulation: Shareholder Derivative Actions Against Insiders Under Rule 10b-5*, 1966 DUKE L.J. 166.

[8] "[U]se of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . ." may be incidental to the fraudulent transaction according to Loss at 1519-28. *See, e.g.*, Matheson v. Armbrust, 284 F.2d 670 (9th Cir. 1960) (interstate telephone calls made before fraudulent transaction, which was itself entirely intrastate was sufficient for "instrumentality of interstate commerce.") and Nemitz v. Cunny, 221 F. Supp. 571 (N.D. Ill. 1963) (intrastate telephone call closely related to interstate commerce.)

[9] "[T]o use or employ any manipulative or deceptive devise . . ." is not defined by Sec. 10(b) or section 10b-5. Questions have arisen as to the interrelation of these three subsections of rule 10b-5. *Compare*, Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951) where the subsections were held to be "mutually supporting," *with* Trussel v. United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1964) where the court stressed the differences in the nature of suits brought under the three subsections.

[10] "[I]n connection with a sale or purchase . . ." was a strict requirement of Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952); however, this paper will later show that the instant case of Entel v. Allen has placed some doubt on the necessity of such a requirement.

[11] The 1933 and 1934 acts are not "self executing" to the extent that they do not specifically provide a private right of action, Hooper v. Mountain States Sec. Corp., 282 F.2d 195, 201 (5th Cir. 1960).

nized by the judiciary.[12] Thus, purchasers[13] and sellers,[14] as well as the Commission, can now initiate suit under 10b-5.

Since the hurdle of implied liabilities, the courts have gradually watered-down the elements of proof under 10b-5 as compared with the restrictive elements associated with common law fraud.[15] But even so, some elements of common law deceit[16]—false or omitted *representations* of *material fact* which were *relied* upon by plaintiff to his *detriment*, defendant having cognizance of the falsity (*scienter*)[17]—have been carried over to fraud under 10b-5. The presence of some type of fraudulent scheme or device by the buyer or seller of securities is essential, whether it be in the form of an affirmative misrepresentation,[18] half-truth[19] or non-disclosure.[20] In addition, the Second Circuit in *List v. Fashion Park*[21] held that the elements of materiality and reliance must be proved by the plaintiff seeking his

[12] Kardon v. National Gypsum Co., 73 F. Supp. 798, 800 (E.D. Pa. 1947) involved a conspiracy between defendants and a third company to which the defendants had sold the bulk of the corporate assets pursuant to an agreement made prior to their purchase of plaintiff's stock. The court reasoned that "under any reasonably liberal construction, these provisions [Section 10(b) and rule 10b-5] apply to directors and officers who, in purchasing the stock of the corporation from others, fail to disclose a fact coming to their knowledge by reason of their position, which would materially affect the judgment of the other party to the transaction." The court found a private right of action based on implication and founded in basic tort law. *See also*, Speed v. Transamerica Corp., 99 F. Supp. 808, 828-29 (D. Del. 1951) which held that "the rule is clear" that a cause of action lies against an insider under rule 10b-5; *accord*, Reed v. Riddle Airlines, 266 F.2d 314 (5th Cir. 1959); *contra*, Rosenberg v. Globe Aircraft Corp., 80 F. Supp. 123 (E.D. Pa. 1948). There can be no doubt as to the validity of *Kardon* since the doctrine has been approved and adopted in six circuits, *e.g.*, Crist v. United Underwriters, Ltd., 343 F.2d 902 (10th Cir. 1965); Texas Con. Life Ins. Co. v. Dunne, 307 F.2d 242 (6th Cir. 1962); Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960); Speed v. Transamerica Corp., 235 F.2d 369 (3d Cir. 1956); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951). Also, the doctrine has been adopted by other circuits by way of dictum, *e.g.*, Brouk v. Managed Funds, Inc., 286 F.2d 901 (8th Cir. 1961); Beury v. Beury, 222 F.2d 464 (4th Cir. 1955).

[13] *See, e.g.*, Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961) where buyers were treated the same as sellers giving them the same unrestricted remedy, "no reason being shown why Congress should have intended to treat them differently." *Contra*, Rosenberg v. Globe Aircraft Corp., 80 F. Supp. 123 (E.D. Pa. 1948).

[14] *See, e.g.*, Speed v. Transamerica, 71 F. Supp. 457 (D. Del. 1947) where it was held that 10b-5 gives a private right of action for civil liability for violation of the statute and the injured parties were not left to their common law remedies when defrauded in selling their shares.

[15] *See, e.g.*, Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961). Loss stated that the elements of common law deceit has itself been "considerably softened." For a thorough discussion in specific areas of the elements of proof under 10b-5 as compared to common law fraud, *see*, Comment, *Negligent Misrepresentations Under Rule 10b-5*, 32 U. CHI. L. R. 824 (1964); Comment, *Civil Liability Under Section 10B & Rule 10b-5: A Suggestion for Replacing the Doctrine of Privity*, 74 YALE L.J. 658 (1965); *Proof of Scienter Necessary in a Private Suit Under SEC Anti-fraud Rule 10b-5*, 63 MICH. L. REV. 1070 (1965). This paper will discuss the elements only in skelton form, *see*, notes 17-28 *infra* and accompanying text.

[16] *See* Loss at 1431 for a summary comparison of common law fraud and fraud under the Securities Acts of 1933 and 1934.

[17] *See generally*, BROMBERG, *supra* note 2.

[18] Kardon v. Nat'l Gypsum Corp., 69 F. Supp. 512 (E.D. Pa. 1946).

[19] *See, e.g.*, Texas Con. Life Ins. Co. v. Bankers Bond Co., 187 F. Supp. 14 (W.D. Ky. 1960).

[20] *See, e.g.*, Cochran v. Channing Corp., 211 F. Supp. 239 (S.D.N.Y. 1962); *see also* Meisel v. New Jersey Trust, 218 F. Supp. 274, 278 (S.D.N.Y. 1963) where the court stated, "[T]he kind of 'fraud or deceit' reached by the Rule is that which induces the purchase by plaintiff. . . ." Kohler v. Kohler Co., 319 F.2d 634 (7th Cir. 1963) went so far as to require defendant to anticipate what will mislead a plaintiff. *See also* In the Matter of Cady, Roberts & Co., 40 S.E.C. 907 (1961) and Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145 (10th Cir. 1967) which are the leading cases on non-disclosure although not private actions.

[21] 340 F.2d 457, 462 (2d Cir. 1965). There the court found that to the requirement that "the *individual* plaintiff must have acted upon the fact misrepresented, is added the parallel requirement that a *reasonable* man would also have acted upon the fact misrepresented."

remedy under 10b-5.[22] On the other hand, as departure from common law fraud, it would appear that scienter[23] and privity[24] are no longer necessary elements of proof. Likewise, the requirement of causation has been rejected by some courts.[25] Although the courts are not completely in harmony as to what are the elements of a 10b-5 cause of action, it is still evident that the procedural and evidentiary advantages of such an action over a state action make 10b-5 the best avenue for the defrauded investor to follow.[26]

Rule 10b-5 has been readily recognized in many types of fraudulent situations—for example, nondisclosure,[27] misrepresentation,[28] and broker-dealer fraud.[29] Outside these types of 10b-5 actions, the courts have hesitated to tread. Particularly, the judicial recognition of the rule as a weapon against the corporate insider who has perpetrated a fraud on the corporation by use of his managerial position has been cautious. Although it is hornbook law that the directors owe a fiduciary duty to the shareholders or to the corporation,[30] courts have been troubled in applying 10b-5 where there has been a breach of this duty. *First*, 10b-5 specifically deals only with the purchase or sale of securities.[31] This is a limiting factor since there is not always a purchase or sale of securities coinciding with a breach of fiduciary duty. *Secondly*, there is the simple question of whether 10b-5 should apply to what has always been a state cause of action.[32] The prime difficulty in applying 10b-5 to breach of fiduciary duty is that a fraud is not always involved. However, a violation of 10b-5, albeit styled *fraud*,

[22] Materiality encompasses those facts "which in reasonable and objective contemplation might affect the value of the corporation's stock or securities and which the insider should reasonably believe are unknown to the outsider." Kohler v. Kohler, 319 F.2d 634, 642 (7th Cir. 1963).

[23] Loss at 1440 states: "Scienter may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known." Loss comes to the conclusion that scienter is not essential as an element of 10b-5. But courts previously held that intent is essential to a scheme to defraud, *e.g.*, Rice v. U.S., 149 F.2d 601 (10th Cir. 1945). Other courts have inferred intent readily to escape the troublesome issue of whether scienter was present, *e.g.*, U.S. v. Vandersee, 279 F.2d 176, 179 (3d Cir. 1960); Walters v. U.S., 256 F.2d 840, 841 (9th Cir. 1958).

[24] The requirement of privity seems to have been done away with due to the broad notions of 10b-5. *See, e.g.*, Fischmen v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951) (supports the contention that privity of contract is not necessary to allow recovery); Cochran v. Channing Corp., 211 F. Supp. 239, 243-44 (S.D.N.Y. 1962) (which held that if at the trial plaintiff could prove the asserted allegations "the fact that there is no privity of contract does not amount to a fatal defect of proof."); Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y. 1961) (privity of contract is at best only "evidentiary."); Texas Con. Life Ins. Co. v. Bankers Bond Co., 187 F. Supp. 14 (W.D. Ky. 1960), *rev'd on other grounds*, 307 F.2d 242 (6th Cir. 1962) ("The court is of the opinion that [lack of privity] is not material under the statute."). *Compare with*, Joseph v. Farnsworth Radio & Telev. Corp., 99 F. Supp. 701 (S.D.N.Y. 1951), *aff'd per curiam*, 198 F.2d 883 (2d Cir. 1952) where "a semblance of privity between the vendor and purchaser of the security in connection with which the improper act, practice or course of business was involved seems to be requisite. . . .").

[25] Globus, Inc. v. Jaroff, Darrer, Silver & Techmation Corp., 266 F. Supp. 524 (S.D.N.Y. 1967) ("Plaintiff need not establish causation in a strictly mathematical sense.") *Contra*, Barnett v. Anaconda Co., 238 F. Supp. 766 (S.D.N.Y. 1965).

[26] *Supra* note 2.

[27] Kardon v. Nat'l Gypsum Corp., 69 F. Supp. 512 (E.D. Pa. 1946).

[28] Royal Air Prop., Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962); Matheson v. Armbrust, 284 F.2d 670 (9th Cir. 1960).

[29] BROMBERG, ch. 5: Direct-Personal Dealing (Broker-Dealers).

[30] 3 W. FLETCHER, CYCLOPEDIA CORPORATIONS §§ 1167-74 (1965), Comment, *Fiduciary Duty of Directors & Officers of Private Corporations*, 27 TENN. L. REV. 284 (1960).

[31] *Supra* note 12; *infra* note 36.

[32] Breach of fiduciary duty is a state cause of action, *see, e.g.*, Burnett v. Word, 412 S.W.2d 792 (Tex. 1967).

is not necessarily *common law fraud*. Therefore, the acts of a defendant and the overall transaction must be viewed in light of the purpose[33] of 10b-5. As will be seen, a breach of fiduciary duty is *possibly* a violation of 10b-5 notwithstanding the absence of fraud.[34]

The first decision to consider these problems was *Birnbaum v. Newport Steel Corp.*[35] There a group of stockholders sued derivatively alleging specific acts of fraud and a breach of fiduciary duties caused by the directors' rejection of an offer of merger which would have considerably benefited the stockholders. The court easily dispensed with the case by holding the shareholders had no standing to sue because they were neither sellers nor purchasers within the meaning of 10b-5. The exact meaning of "in connection with a purchase or sale of securities" in 10b-5 is not clear. It is well established now that if the corporation was a purchaser or seller, the individual plaintiff who sues derivatively need not also satisfy the purchaser or seller requirement. For example, if the corporation has made an issuance of stock in consideration of property received[36] or has exchanged stock for stock,[37] a coinciding purchase or sale of stock by the individual is not prerequisite to a derivative suit. Conversely, if the individual was a purchaser or seller, the corporation need not have this status also.[38] However, the one who alleges the cause of action must have been the one who sold or purchased his shares or stand in the shoes of the one who did, *i.e.*, sue derivatively. The problems concerning the meaning of purchase or sale under 10b-5 arise when the fraudulent transaction involves something other than a common law sale. For instance, a corporate charter has been held to be a contract to sell if a shareholder is forced to accept cash or securities pursuant to a merger.[39]

Recently, the Second Circuit has placed serious doubt on the purchaser-or-seller requirement by the decision of *Vine v. Beneficial Fin. Co.*[40] In *Vine*, the defendant-directors of the subsidiary corporation acted in concert with the directors of the parent corporation to effectuate a short-form merger of the two corporations. The plaintiff, a shareholder in the subsidiary, was forced to exchange his shares pursuant to the terms of

[33] *Supra* note 3 and accompanying text.

[34] Categorical cliches such as "this is a breach of fiduciary duty and not 10b-5 fraud" or "this is a state cause of action and not a 10b-5 action" or "mismanagement versus 10b-5 fraud" cannot be avoided but must be carefully used. Otherwise, the trap of pigeonholing will blind the reader to the overlap which does exist in all areas of 10b-5, *viz.*,most state causes of action involving fraud in connection with a security transaction can be brought under 10b-5; but not all, in fact only a few, 10b-5 actions can be brought on the state level.

[35] 193 F.2d 461 (2d Cir. 1951).

[36] Hooper v. Mountain States Security Corp., 282 F.2d 195, 202 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961) held that "[I]t is not essential . . . that for an issuing corporation to come under § 10(b) and X-10b-5 it have the status of an 'investor'." Rather, the corporation is that type "person" encompassed in 10b-5 and if the original issuance of stock in consideration of property received was not a sale, "it certainly amounted to an arrangement in which [the corporation] 'otherwise dispose[d] of' its stock." (citing § 3(a)(14), 15 U.S.C.A. § 78c(a)(14) (1964).

[37] O'Neill v. Maytag, 339 F.2d 764 (2d Cir. 1964).

[38] Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947).

[39] Voege v. American Sumatia Tobacco Corp., 241 F. Supp. 369 (D. Del. 1965) where the court held the plaintiff was a seller since the charter is a contract to sell in that it required the shareholder to accept the terms of any merger.

[40] 374 F.2d 627 (2d Cir. 1967).

the merger or pursue his appraisal rights in accordance with statutory procedure. Plaintiff refused to exercise either course but instead sought to have the merger set aside on the ground that it was carried out by fraudulent means. The defendants argued that plaintiff had no standing to sue because he was neither a seller nor purchaser as contemplated by 10b-5. The court answered this argument by holding that the plaintiff had constructively sold his shares. The rationale was that the plaintiff would eventually have to transfer his shares pursuant to the terms of the merger or via appraisal rights, *i.e.*, sell his shares.[41] The court concluded by acknowledging but not completely adopting the SEC's argument that "prior decisions in this circuit [citing *Birnbaum* and *O'Neill* (discussed *infra*)], often cited for the rule that only a seller or purchaser may bring a Rule 10b-5 action, have been too broadly read and can be distinguished . . . ."[42] Thus one can glean from the recent decisions that in the absence of a clear corporate or individual sale or purchase the courts may still imply such by construing the circumstances "not technically and restrictively, but flexibly to effectuate" the remedial purposes of the securities laws.[43]

Turning to the issue of breach of fiduciary duty, the court in *Birnbaum* held the plaintiffs had no federal cause of action because 10b-5 was not designed for the "fraudulent mismanagement of corporate affairs" but rather for "that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities. . . ."[44] While purporting the follow *Birnbaum's* distinction between 10b-5 fraud and "fraudulent mismanagement," the district courts in the Second Circuit nevertheless broadened the actions against insiders to managerial schemes containing the "elements" of a 10b-5 claim.[45] Hesitantly, the Second Circuit, when subsequently with a question of fraudulent mismanagement, seemed to fall in step with the broadening of 10b-5 actions. In *Ruckle v. Roto Am. Corp.*,[46] the plaintiff, having accumulated enough voting power to take the control of the board of directors from the defendants, sought injunctive relief under 10b-5 to restrain defendants from issuing a large block of treasury stock to themselves thus perpetuating their control. Defendants

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[41] Vine v. Beneficial Fin. Co., 374 F.2d 627, 634 (2d Cir. 1967) which cites Leech, Transactions in Corporate Control, 104 U. PA. L. REV. 725, 832-35 (1965).

[42] Vine v. Beneficial Fin. Co., 374 F.2d 627, 636 (2d Cir. 1967).

[43] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

[44] *Id.* at 464. See Loss at 1469 where it is stated "by the same token, the *Birnbaum* case could be readily distinguished on its facts if a future plaintiff . . . should allege (1) a conspiracy between the seller and buyer to loot the corporation, or (2) a transfer of control under circumstances that should awaken the former insider's suspicion that the buyer would loot or mismanage the corporation." Loss implies that there is no guarantee that suit will lie under 10b-5 but no precedent to date will show they would *not* come under 10b-5.

[45] New Park Mining Co. v. Cranmer, 225 F. Supp. 261, 266 (S.D.N.Y. 1963) held "[I]t is immaterial whether the purchase or sale was part of a larger scheme of corporate mismanagement if the *elements* of a claim under . . . rule 10b-5 are otherwise present." Ironically, the court failed to enumerate the "elements" of a 10b-5 claim while holding out the solution to all other courts. *New Park Mining* was an extension of the same court's decision of Pettit v. American Exchange, 217 F. Supp. 21 (S.D.N.Y. 1963) which held that 10b-5 could not be used as a tool for federal inquiry into mismanagement by insiders where the purchase or sale was only "incidental to a major mismanagement issue."

[46] 339 F.2d 24 (2d Cir. 1964).

relied on *Birnbaum* alleging that plaintiff had not stated "that type of misrepresentation of fraudulent practice usually associated with the sale or purchase of securities" and further that the corporation could not possibly be defrauded by the controlling majority of its board of directors. The court of appeals rejected both defenses and held a valid claim under 10b-5 had been stated.[47] The Second Circuit placed great weight on the fact that to deny relief for such a "glaringly apparent" scheme would leave the minority shareholder without a remedy under securities law.[48]

However, the possible far-reaching impact of *Ruckle* was diminished somewhat by the later decision of the Second Circuit in *O'Neill v. Maytag*,[49] also involving a control maneuver scheme. There again, as in *Birnbaum*, the Second Circuit refused to extend Rule 10b-5 to actions arising from a breach of fiduciary duty by corporate directors. There was no misrepresentation, half-truth or nondisclosure familiar to the common 10b-5 action. Instead, the directors, looking to their own interest first, attempted to perpetuate their control which caused the corporation to suffer an unfair and inequitable business transaction.[50] The court said:

> The question posed by this case is whether it is sufficient for an action under Rule 10b-5 to allege a breach of one of these general fiduciary duties when the breach does not involve deception. We think it is not: At least where the duty allegedly breached is only the general duty existing among corporate officers, directors and shareholders, no cause of action is stated under Rule 10b-5 unless there is an allegation of facts amounting to deception.[51]

In dismissing the complaint, the court attempted to distinguish *Ruckle* on the basis that the facts involved "a clear allegation of deception,"[52] while the facts of *O'Neill* did not. Finally, the court summed up its position by saying 10b-5 was not intended as "a mandate to inquire into every allegation of breach of fiduciary duty. . . ."[53]

As can be seen, reconciliation of *O'Neill* and *Ruckle* is a difficult, if not impossible, task. One distinction rests on the presence of a defrauded minority of directors in *Ruckle* whereas in *O'Neill* the board of directors

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[47] *Id.* at 29. The court distinguished *Birnbaum* as applicable only when the allegedly defrauded corporation was not a buyer or seller of securities. Also, the court held that "a majority or even the entire board of directors may be held to have defrauded their corporation, when it is practical as well as just to do so, courts have experienced no difficulty in rejecting such cliches as the directors constitute the corporation and a corporation, like any other person, cannot defraud itself."

[48] *Id.* at 28, where it is stated, "Barring suit by a corporation defrauded under those circumstances would, as a legal and practical matter, destroy any remedy against the perpetrator of the fraud."

[49] 339 F.2d 764 (2d Cir. 1964).

[50] In 1958, National and Pan American World Airways had each issued shares of its own stock to a trustee for the benefit of the other. The CAB found this transaction detrimental to the public interest and ordered an re-exchange of the stock. Two of the directors, while in complete control of the board, found the National block of shares held by the trustee to be a threat to their control of the board. National's board approved an exchange of their stock held by Pan American for Pan American shares held by National. This exchange was extremely unfavorable to the shareholders of National due to the market value of the Pan American stock.

[51] 339 F.2d 764, 767 (2d Cir. 1964).

[52] *Id.* at 768.

[53] *Id.* at 768.

acted as a unit.[54] Thus it would seem that if a corporation's minority segment alleges "deception" in violation of a fiduciary duty, a 10b-5 cause of action is available; but, if there is a breach of fiduciary duty which involves no deception, the claimant must seek the traditional redress under state law for "fraudulent mismanagement." A more meaningful distinction is the "direct benefit of the cheap stock to the insider who got it, not only in dollar terms but in terms of the control fight then in progress."[55] In *Ruckle*, the fraudulent transaction resulted in a direct benefit to the majority directors, whereas in *O'Neill*, the directors benefited only indirectly by eliminating the block of shares held by Pan American which posed a threat to their control.[56] Whether this distinction of direct versus indirect benefit to the directors will stand is yet to be seen.[57] These ostensible reconciliations are of little value when viewed with the "purpose" of 10b-5 as the criterion.[58] In both cases there was an absence of good faith, the transaction was not negotiated at arms-length, and a detriment was suffered "in connection with a purchase or sale of securities." Yet, only one court found an "overreaching" within the meaning of 10b-5. Subsequently, decisions such as *A. T. Brod & Co. v. Perlow*[59] seriously challenged the decision of *O'Neill*. In *Brod*, not only were the narrow interpretations of Rule 10b-5 denounced, but also the court expressly broadened 10b-5 so far as to include "*all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception."[60] Thus, it would appear that the *Birnbaum-O'Neill* distinction between "10b-5 fraud" and "fraudulent mismanagement" has been discarded for the more equitable test: is this transaction one of those "schemes" or "devices" which 10b-5 declares unlawful?[61]

The court in the instant case of *Entel v. Allen* was confronted with both problems of applying 10b-5 to "fraudulent managerial schemes," *viz.*, (1) whether the purchaser-or-seller requirement was essential, and if so, whether it was satisfied and (2) whether a federal jurisdiction should extend to actions based on breach of corporate fiduciary duty. Finding itself "bound to follow the decisions of [the Second] Circuit,"[62] the court dispensed with the first issue by interpreting *Vine* as possibly doing away with the "purchaser-or-seller requirement."[63] Although this idea has been

[54] BROMBERG at 84 which states that the "availability of 10b-5 [in *Ruckle*] turned on the fortuity of having minority directors." This same distinction is drawn in 1966 DUKE L.J. 167, 182-83.

[55] *See* BROMBERG at 84.

[56] *See* BROMBERG at 4.7(1) n.67.

[57] *See, e.g.*, Dasho v. Susquehana Corp., 380 F.2d 262 (7th Cir. 1967) where "direct benefit" in the form of cash was acquired by indirection in violation of a corporate fiduciary duty.

[58] *Supra* note 3.

[59] 375 F.2d 393 (2d Cir. 1967).

[60] *Id.* at 397.

[61] Cases such as A. T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967); Ruckle v. Roto American Corp., 339 F.2d 24 (2d Cir. 1964); New Park Mining Co. v. Cranmer, 225 F. Supp. 261 (S.D.N.Y. 1963); Pettit v. American Exchange, 217 F. Supp. 21 (S.D.N.Y. 1963). illustrate the courts application of 10b-5 in line with its "purpose" rather than emphasizing the "fraud" nature of 10b-5 as in *Birnbaum*.

[62] Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967).

[63] *Id.* at 70.

followed,[64] most courts have refused to apply 10b-5 in the absence of a purchaser or a seller.[65] Indeed, another court expressly stated that the *Birnbaum-O'Neill* requirement of purchaser-or-seller has not been overruled by *Vine* or *Brod* but rather "the question was expressly left open."[66] As has been stated, it is now well established that the corporation and individual need not be sellers or purchasers simultaneously; but, the one who alleges the cause of action must have been a purchaser-or-seller or stand in the shoes of the one who was.[67] At this point, the court in *Entel* went astray when presented with one party who had the cause of action (the individual for breach of fiduciary duty) and another party who had the standing to sue (Atlas Corporation was a seller). Rather than viewing the shareholder in *Vine* as having met the purchaser-or-seller requirement by having "constructively" sold his shares, the *Entel* court allowed plaintiff standing to sue by interpreting *Vine* as possibly doing away with the purchaser-or-seller requirement. Why did plaintiff in *Entel* not allege breach of fiduciary duty to the *corporation* as well as to the shareholder? Admittedly the court found no "deception practiced on Atlas"[68] which would preclude recovery under *O'Neill*. But even though there was no deception at the corporate level, the transaction was inequitable and a direct benefit accrued to director Hughes. Put in this light, the circumstances of *Entel* more closely resemble *Ruckle* than *O'Neill*. Thus, a derivative suit alleging breach of fiduciary duty to the corporation would give a cause of action to the one who had standing to sue, making it unnecessary to rely on *Vine*. Although it has been submitted that Judge Bonsal's construction of *Vine* is "unwarranted" and that such case should be limited to its facts,[69] his interpretation is correct to the extent that it recognizes the purchaser-or-seller requirement has been softened. For example, the Supreme Court and Congress "never intended to give to the word 'sale' the limited common-law meaning"[70] but rather includes short-form mergers,[71] actions for injunctions which do not re-

[64] *See, e.g.*, Weitzen & Epstein v. Kearns, 271 F. Supp. 616 (S.D.N.Y. 1967) where Judge Bonsal stated "[T]he purchaser-or-seller and the securities-fraud limitations placed on the application of Section 10(b) and Rule 10b-5 by the court in *O'Neill* and *Birnbaum* have been seriously challenged, if not overruled."

[65] *See, e.g.*, Symington Wayne Corp. v. Dresser Indus., Federal Securities Law Reporter ¶ 91,978 at 96,325 (1966-67 Trans. Binder) (2d Cir. 1967) where it was stated that "[t]his court has expressly left undecided the question whether one who is neither a purchaser nor a seller can attack a transaction under Rule 10b-5. . . ." In United Indus. Corp. v. Nuclear Corp. of America, Federal Securities Law Reporter ¶ 91,975 at 96,315 (1966-67 Trans. Binder) (S.D.N.Y. 1967) Judge Palmieri recognized the danger of granting a summary judgment due to "expanded application of federal jurisdiction to cases of this nature by the Second Circuit. . . ." (citing *Vine, Brod* and *Entel.*).

[66] Greenstein v. Paul, Federal Securities Law Reporter ¶ 92,011 at 96,435 (1966-67 Trans. Binder) (S.D.N.Y. 1967) the court said *Vine* "did not hold that plaintiff need not be a seller. Rather, the court held that on the facts of that case plaintiff was to be considered a seller within the meaning of Section 10(b)."

[67] *See* notes 36-38, *supra.*

[68] 270 F. Supp. 60, 69 (S.D.N.Y. 1967).

[69] Lockwood, *Corporate Acquisitions and Actions Under Secs. 10(b) and 14*, 23 THE BUSINESS LAWYER (1968).

[70] Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967).

[71] Vine v. Beneficial Fin. Co., 374 F.2d 627 (2d Cir. 1967).

quire a "sale" as a prerequisite,[72] and original issuance of stock.[73]

Thus, while Judge Bonsal's observations on *Vine* may be correct, his allowance of standing to sue for breach of state fiduciary duty based on *Brod* is questionable. The court interpreted *Brod's* statement of 10b-5 prohibiting "*all* fraudulent schemes in connection with the purchase or sale of securities" as necessarily including "undisclosed scheme(s) to breach State corporate fiduciary law. . . ."[74] At first glance, one might conclude that "*all* fraudulent schemes" means *any* fraud which has the fortuity of involving securities. But a careful reading of *Brod* shows that the court expressly recognized the distinction in actions based on 10b-5 fraud and fraud brought on the state level by stating: "whether there is actionable fraud [under 10b-5] *or* a mere breach of contract depends on the facts and circumstances developed at the trial . . . [Emphasis added.]."[75] It cannot be questioned that "mere breach of contract" is a state cause of action. Indeed, *Mutual Shares Corp. v. Genesco*[76] held that 10b-5 does not extend to undisclosed schemes in violation of state corporate fiduciary law,[77] at least when the scheme is perpetrated by an outsider.

Should a 10b-5 cause of action be available against the director who has breached his fiduciary duty? Remembering that 10b-5 was intended as an equitable and prophylactic relief[78] which is not limited by common law fraud, breach of fiduciary duty does come within the purview of 10b-5 due to its unfair and inequitable nature. While Judge Bonsal's extension of 10b-5 to breach of fiduciary duty may prove in the future to have been foresighted, no case has gone so far to date.[79] Instead of trying to find precedent for the extension of 10b-5 to breach of fiduciary duty,[80] a flat, unprecedented statement that 10b-5 was not only *intended* to remedy such breaches but also that a natural and logical inference drawn from *Ruckle* leads to this conclusion would have been met with great support.[81] The shareholder who has been defrauded but who is lacking the good fortune of having sold or purchased securities as an incident of the fraud might view the *Entel* decision as the needed precedent to seek his remedy due to that court's construction of *Vine*. In the same vein, the shareholder who has a cause of action based on breach of corporate fiduciary

[72] Mutual Shares Corp. v. Genesco, Federal Securities Law Reporter ¶ 91,983 at 96,345 (1966-67 Trans. Binder) (2d Cir. 1967) held the purchaser-or-seller requirement was not controlling in an injunctive suit even though "some doubt has been cast on this principle (citing *Entel*), the Court of Appeals has never overruled it. In recent decisions the question was expressly left open."

[73] Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

[74] Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967), held that *Brod* involved an action for breach of contract and further held that "if an undisclosed scheme to breach state contract law is encompassed by Section 10(b) and Rule 10b-5, then an undisclosed scheme to breach State corport fiduciary law must also be covered."

[75] A. T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967).

[76] Federal Securities Law Reporter ¶ 91,983 (1966-67 Trans. Binder) (2d Cir. 1967).

[77] *Id.* at 96,344.

[78] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

[79] Not even an extension of *Brod* would give rise to such a conclusion.

[80] Judge Bonsal tried to find the *Brod's* language as giving a cause of action for breach of fiduciary duty.

[81] The SEC surely would approve an extension of their authority as would the lower courts of the Second Circuit would approve the extension of *Ruckle*.

duty will seek redress in the federal system using *Entel's* interpretation of *Brod* as precedent. However, shareholder rejoicing should possibly await the rendering of a higher court's decision as to whether the purchaser-or-seller requirement has been abolished and whether there is a distinction between state actions for breach of fiduciary duty and federal actions based on Rule 10b-5.

Indeed, if this distinction between state actions and federal actions is not drawn soon, the potency of the federal cause of action under 10b-5 may cause a snowball effect preempting all state fraud actions in the securities field. While it cannot be doubted that 10b-5 has had a forceful and dynamic impact, it must have some boundaries. Judge Bonsal's conclusion that further judicial extension of 10b-5 should await congressional action is an understatement. The shareholder who is elated with the decision of *Entel* should be warned that, at the present time, this decision is on the outer edge of the boundary of 10b-5. However, if the decision of *Entel* is upheld, the next shareholder who is uncertain as to the remedies available in the federal system should not hesitate to try his luck with 10b-5.

Robert E. Wilson

Conflict of Laws — Wrongful Death — Significant Contacts vs. Lex Loci

Suit was brought in Texas for the wrongful death of the passengers of a chartered aircraft that crashed in Colorado on 3 November 1964. With the exception of one passenger who was an Illinois resident, all aboard the plane were residents of Texas. Three of the four passengers were executives of a Texas-based corporation that had contracted the trip with Mustang Aviation, Inc. whose principal place of business was Texas. The aircraft was garaged, maintained, licensed, and contracted for in Texas and the connection between any of the principals and Colorado was limited to the crash itself. Appellants contended that since the most significant total relationship with the flight was had by Texas, the arbitrary limitation on damages recoverable under the Colorado wrongful death statute should not be applied by the Texas court to limit appellant's recovery. *Held, affirmed*: Irrespective of Texas' sole significant interest in the measure of recovery for the wrongful death of Texas residents, the conflicts rule of *lex loci delicti* determines all substantive matters including the measure of damages. *Marmon v. Mustang Aviation, Inc.*, 416 S.W.2d 58 (Tex. Civ. App. 1967), *error granted.*

Three months prior to this decision, in a factually similar New York crash case, the Second Circuit held that the law to be applied is the law of the place having the most significant relationship with, and the greatest interest in, the issues presented. *Gore v. Northeast Airlines, Inc.*, 373 F. 2d 717 (2d Cir. 1967).

Lex loci delicti is the traditional rule that the law of the place where a tort is committed governs the existence and extent of any liability therefor.[1] The rule historically has been applied by the courts in tort cases to decide which state's substantive law shall be controlling in such issues as whether an act is the legal cause of another's injury[2] and the measure of damages for a tort.[3] The rule evolved from those cases in which the forum state's only interest was in providing a neutral forum because the pertinent facts had occurred in another state. In 1904 the application of *lex*

[1] H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 165 (4th ed. 1964).

[2] RESTATEMENT OF CONFLICTS OF LAWS § 383 (1934): Whether an act is the legal cause of another's injury is determined by the law of the place of the wrong. Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1903); Norfolk & W. Ry. v. Barney, 262 Ky. 228, 90 S.W.2d 14 (1936); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); Pendar v. H. & B. American Machine Co., 35 R. I. 321, 87 A. 1 (1913).

[3] RESTATEMENT OF CONFLICTS, *supra* note 2, at § 412: The measure of damages for a tort is determined by the law of the place of the wrong. Black Diamond v. Robert Stewart & Sons, 336 U.S. 386 (1948); Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1903), *aff'd* in Western Union Tel. Co. v. Brown, 234 U.S. 542 (1913).

loci delicti was approved by a United States Supreme Court case,[4] in which suit was brought in Texas for a wrongful death occurring in Mexico. The Court announced the rule that "as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation . . . but equally its extent." Under the theory of *lex loci delicti*, a tort is considered to "vest" its victim with a locally created cause of action (including extent of recovery) which follows him and is enforceable in any jurisdiction where suit is brought.[5] The advantages of the rule are by-products of its arbitrariness: results are consistent, and absolute predictability strongly discourages forum shopping.

In early cases, *lex loci delicti* was enforced unless the entire basis of the claim upon which the suit was brought was contrary to public policy[6] or unless the limitation of recoverable damages is contrary to the forum's public policy.[7] But even with these exceptions the rule led at times to apparently unjust and unacceptable results, and some court began enforcing a less rigid application of the rule. Various interpretations resulted: where defamation occurred in several states, the law of the plaintiff's domicile was held to govern;[8] survival of causes of action should be governed by the law of the forum because it is a procedural question;[9] the question of interspousal immunity was held to be governed by the law of the domicile of the parties;[10] damage limitation was contrary to public policy;[11] the law of the forum was held applicable when the foreign law had not been proved and the presumption was that the foreign law is the same as that of the forum.[12] The rule of *lex loci delicti* is, however, still followed in a majority of the decisions in this country.[13]

The advent of increased popularity of the airplane and resulting crashes has greatly emphasized the shortcomings of *lex loci*. With the speed and range of air travel, the *locus* of the negligence and the *locus* of the resulting injury, if determinable at all, may be in different states and are likely to be fortuitous.[14] The mechanical application of the rule of *lex loci delicti*

[4] Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1903). Mr. Justice Holmes stated:

> The theory of the foreign suit is that although the act complained of was not subject to law having force in the forum, it gave rise to an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found.

Slater v. Mexican Nat'l R.R., *supra* at 126-27.

[5] Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1903).

[6] RESTATEMENT OF CONFLICTS, *supra* note 2, at § 612: No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.

[7] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Poling v. Poling, 116 W.Va. 187, 179 S.E. 604 (1935).

[8] Dale System, Inc. v. Time, Inc., 116 F. Supp. 527 (D. Conn. 1953).

[9] Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).

[10] Haumschild v. Continental Cas. Co., 7 Wis. 130, 95 N.W.2d 814 (1959), noted in 73 HARV. L. REV. 785 (1960).

[11] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), noted in 61 COLUM. L. REV. 1497 (1961), 46 CORNELL L.Q. 637 (1961), 49 GEO. L.J. 768 (1961); 74 HARV. L. REV. 1652 (1961); U. CHI. L. REV. 733 (1961); 47 VA. L. REV. 692 (1961).

[12] Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

[13] For recent compilation of the jurisdictions that apply the *lex loci* rule, Annot., 95 A.L.R.2d 12 (1964).

[14] See facts developed in Long v. Pan American World Airways, Inc., 23 App. Div. 2d 386, 260 N.Y.S.2d 750, *rev'd*, 16 N.Y.2d 337, 213 N.E.2d 796, 226 N.Y.S.2d 513 (1965), where air-

has resulted in a disregard of the *locus* of the negligence unless that element arose in the state in which the crash occurred. The result has been that the place of the injury has been of controlling importance.

Dissatisfaction with the rule became increasingly apparent in the early sixties with the New York Court of Appeals decision of *Kilberg v. Northeast Airlines, Inc.*,[15] which arose out of the same crash as did *Gore*. Although applying the rule of *lex loci delicti* to the extent of recognizing the Massachusetts wrongful death statute as the creator of the cause of action, the court classified the damage limitation as procedural; and in the dictum stated that strong New York public policy required recoverable damage limitations, thus the law of the forum regarding damages would govern. Two years later the same court decided the landmark case of *Babcock v. Jackson*,[16] in which plaintiff was injured in an automobile accident while a guest in defendant's car on a weekend trip to Canada. After finding that all the significant contacts,[17] with the exception of the place of injury, were in New York, the court rejected the rule of *lex loci* because it failed to recognize other jurisdictions' interests in the tort. The court adopted a flexible principle of applying the law of the state with the greatest interest in the issues to be resolved. In 1964 the Pennsylvania Supreme Court overruled[18] the doctrine of *lex loci delicti* in favor of a more flexible rule, similar to that announced in *Babcock*, which would permit "the interplay and clash of conflicting policy factors." In 1965 a unanimous New York Court of Civil Appeals in *Long v. Pan American World Airways*[19] extended the *Babcock* principle to wrongful death cases and the constitutionality of such abandonment was approved by *Richards v. United States* in 1962.[20] The Court had before it the question of which conflicting statutory damage limitation was applicable in a multi-state tort claim for wrongful death. It held that the forum state, after analysis of the competing interests, could constitutionally apply the law of any state which had significant contact with the multi-state tort involved.

Although the court in *Marmon* recognized that it would be on safe constitutional grounds to follow *Richards*, it concluded that the Courts of Civil Appeals of Texas were bound by *stare decisis*. The court found merit in the doctrine of most significant contacts but decided that it was bound by the construction which the Texas Supreme Court and other Texas

liner disintegrated over the Delaware-Maryland border.

[15] *Supra* note 7.

[16] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); *but see*, Kell v. Henderson, 263 N.Y.S.2d 647 (1965), *aff'd*, 270 N.Y.S.2d 552 (1966) where court held that defendants could not move for leave to amend their answer to plead the Ontario guest statute as an affirmative defense in a personal injury action arising out of an automobile accident which occurred in New York involving residents and domiciliaries of Ontario, Canada. *Babcock* held inapplicable because it was not intended to and did not change the established law of New York that a guest has a cause of action for personal injuries against a host in an accident occurring within New York whether those involved are residents or domiciliaries of New York or not.

[17] 191 N.E.2d at 284.

[18] Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

[19] Long v. Pan American World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 133 (1965).

[20] Richards v. United States, 369 U.S. 1 (1962). The Supreme Court recognized the inadequacies of *Slater*.

courts have placed upon the relevant Texas conflicts statute.[21] The court rejected the plaintiff's arguments that the limitation on damages be considered a procedural matter, rather than a matter of the right of recovery,[22] and that the Colorado statute with its limitation on damages is contrary to the public policy of Texas.[23] The latter conclusion was based on a Texas Supreme Court case holding that Texas courts may not refuse to recognize and enforce a foreign right of action merely because Texas law, as applied to the same facts, would afford no relief.

An opposite holding was reached in the instant case of *Gore* in which the Second Circuit found that since it had jurisdiction by virtue of diversity of citizenship, it must apply New York law in determining whether the $15,000 limitation on plaintiff's recoverable damages for wrongful death should apply. The *Gore* court recognized the *Kilberg* dictum that although the right to sue for damages was based upon a Massachusetts statute under the rule of *lex loci delictus*, the limitation upon the recovery could not be applied because it contravened a strong New York public policy. The court noted that the *Kilberg* view, the law of the place of the injury applies as the creator of the cause of action, was supplanted by the reasoning in *Babcock* that the law to be applied to the *entire* cause of action is the law of the jurisdiction having the most significant relationship with, and the greatest interest in, the issue presented. The finding in *Gore* is based upon the *Babcock-Long* criteria of significant contacts with the result that New York law is the most logical to be applied by virtue of the most significant contacts which the court enumerates and analyzes.[24] These significant contacts and not the weight of the strong New York public policy against recovery limitations determined which state's law was to be applied in *Gore*.

Two conflicts theories are set forth in the instant cases. *Vis à vis* the strict rule of *lex loci delicti* upon which the holding in *Marmon* is based, the decision in *Gore* allows a more flexible rule permitting rather than precluding analysis of underlying issues. The *Marmon* court construed the

[21] TEX. REV. CIV. STAT. ANN., art. 4678 (1952) provides:
Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country, such right of action *may* be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. The law of the forum shall control in the prosecution and maintenance of such action in the courts of this State in all matters pertaining to the procedure [Emphasis added.].

[22] The court regarded this approach as unsound and contrary to the holdings in: Davis v. Gant, 247 S.W. 576 (Tex. Civ. App. 1922) *error ref.*; Texas & N. O. R.R. v. Miller, 128 S.W. 1165 (Tex. Civ. App. 1910) *error ref.*; Texas & N. O. R.R. v. Gross, 128 S.W. 1173 (Tex. Civ. App. 1910) *error ref.*

[23] Flaiz v Moore, 359 S.W.2d 872, 876 (Tex. 1962).

[24] Gore v. Northeast Airlines, Inc., 373 F.2d 717, 724, 725 (2d Cir. 1967); *see also*, RESTATEMENT (SECOND) CONFLICT OF LAWS § 379, ch. 9 at (2) (Tent. Draft No. 8, 1963) provides that:
Important contacts that the forum will consider in determining the state of most significant relationship include: (a) the place where the injury occurred, (b) the place where the conduct occurred, (c) the domicile, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.

Texas conflicts statute such that the forum state must look to the state where the injury occurred for a right of action; not only was this state's law the creator of the cause of action, but it also determined the extent of the recoverable damages. *Gore*, on the other hand, held that the state which has the most significant contact with the controversy is the source not only of the extent of recoverable damages, but also of the right of action.

The Texas conflicts statute is susceptible of a construction which would allow the Supreme Court of Texas to adopt the significant contacts theory without having to seek reform in the legislature. The statute provides that where an action for damages arises under foreign law, "such right of action may be enforced in the courts of this State . . . ." Since the wording of the statute does not make enforcement of the foreign right of action mandatory, the court is free to allow plaintiff to enforce that right of action given in the statutes of the state whose law is applicable by virtue of that state having the most significant contacts with the controversy. This interpretation would not lead to constitutional difficulties because the holding in *Richards* allows the forum state to apply the law of any state which had significant contact with the multi-state tort.

It is conceivable in an airplane crash case that an application of the significant contacts theory would result in a limitation on damages which would not have been present under an application of *lex loci delicti.* Had the crash in *Marmon* occurred in Texas and the significant contacts been found in Colorado, and the theory of significant contacts been applicable, the court would have been constrained to apply the law of Colorado and the plaintiff's recoverable damages would have been limited. This would not, however, be inequitable, for it would be the result of the consideration and analysis of all the significant competing interests and not merely those of the state in which the crash occurred.

William O. Wuester III

Eminent Domain — Inverse Condemnation — Taking or Damaging

In 1950 the Mississippi Legislature enacted an Airport Zoning Act, which authorized the creation of local airport zoning boards; these boards were to administer zoning regulations for airport hazard areas. The Act included provisions for the acquisition of air rights, avigation easements, and other necessary land interests.[1] In compliance with the provisions of this act the Joint Airport Zoning Board for Hinds and Rankin counties, Mississippi, enacted a zoning ordinance establishing certain graduated height restrictions for the area immediately surrounding the Jackson Municipal Airport. These restrictions placed eighty acres of appellee's land within an Instrument Approach Zone and a Transition Surface Zone,[2] thereby limiting the height of any structure or trees on this land to fifty feet. Subsequently, the appellee allowed fifteen trees on his land to grow into the restricted airspace. The trees, which had no appreciable economic value, ranged from one to thirteen feet above the restrictive fifty foot ceiling. The Jackson Municipal Airport Authority and the City of Jackson sought a preliminary injunction to require the appellee to "top" or remove the specified fifteen trees, but the Hinds County Chancery Court sustained the landowner's general demurer to the complaint. *Held, affirmed*: The Mississippi Supreme Court found the zoning order "so interfered with and restricted the use and enjoyment of the defendant-appellee's private property as to constitute a taking or damaging thereof for public use without compensation being first made."[3] *Jackson Mun. Airport Auth. v. Evans*, 191 So. 2d 126 (Miss. 1966).

Property rights in airspace are divided into two categories: public, the United States claims ownership of all airspace above the land and territories within its federal jurisdiction,[4] and private, "the landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."[5]

Prior to *United States v. Causby*,[6] the landmark case which established the latter principle, landowners' remedies for damages from aircraft and airports lay mainly in the tort actions of trespass and nuisance, which proved inadequate for several reasons. First, the modern statutes that modified the common law concept of sovereign immunity often limited government liability in tort actions to cases involving negligence.[7] Second,

[1] Airport Zoning Act § 7544-13, 6 MISS. CODE ANN. § 7544-13 (1956).
[2] These terms are used as defined in the zoning ordinance passed by the Joint Zoning Board.
[3] The basis of the decision was article 3, section 17 of the Mississippi Constitution.
[4] Federal Aviation Act of 1958 § 1508, 72 Stat. 737, 49 U.S.C. § 1301 (1964).
[5] United States v. Causby, 328 U.S. 256, 264 (1946).
[6] 328 U.S. 256 (1946).
[7] This is the provision in the Federal Tort Claims Act, 63 Stat. 101, 28 U.S.C. §§ 1346(b), 2680(a) (1958); *see also* Tucker Act, 63 Stat. 62, 28 U.S.C. § 1346(a)(2) (1958).

trespass, which was designed to protect the exclusive possession of land,[8] required a *direct invasion* of the airspace for compensation.[9] Consequently, injury from noise and other incidences of aircraft not flying directly over one's property went uncompensated.[10] For such damage, private nuisance was the appropriate remedy, but there had to be an *unreasonable interference* with the use and enjoyment of property before damages would be granted.[11] Third, nuisance had its limitations. In applying this remedy, the courts' attempts to balance the interest of freedom of transit and public need against the concept of free and unrestricted use and enjoyment of the land have usually put the injured party at a disadvantage for two reasons. (1) When the landowner sought an injunction against the noise, he often confronted the doctrine of "legalized nuisance" which established the rule that nuisance claims arising from a legally authorized public facility would be denied.[12] (2) Another obstacle he confronted was Section 60.17 of the Civil Air Regulations,[13] which includes the airspace necessary for takeoffs and landings as part of the defined minimum safe altitudes and encompasses it within navigable airspace.[14] As the public has the right of transit in all navigable airspace,[15] any interference arising from takeoffs and landings must amount to a constitutional "taking" in order for the plaintiff to recover.[16]

Under the constitutional concepts of "taking" or "damaging" of private property, landowners have been much more successful in recovering for their losses than under trespass and nuisance. The Fifth Amendment, the basis of the doctrine of "*taking*," prohibits the acquisition of property for public use without due compensation. It has been interpreted to place such a limitation on "*all* the sovereign powers of government which may be used to interfere with the quiet enjoyment of private property . . . [Emphasis added.]."[17] As "any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the

[8] F. HARPER, LAW OF TORTS § 33 (1933).

[9] RESTATEMENT (SECOND) OF TORTS § 159 (1965) provides:

> 2. Flight by aircraft in the air space above the land of another is a trespass if, but only if,
>
> a. it enters into the immediate reaches of the air space next to the land, and
>
> b. it interferes substantially with the other's use and enjoyment of his land.

[10] Batten v. United States, 306 F.2d 580 (10th Cir. 1962); *see also* Tondel, *Noise Litigation at Public Airports*, 32 J. AIR L. & COM. 387 (1966).

[11] F. HARPER, LAW OF TORTS § 181 (1933). These cases fall into the category of private nuisance. *See, e.g.*, Corbett v. Eastern Air Lines, Inc., 166 So. 2d 196 (Fla. 1964). Prosser states that any substantial interference with the plaintiff's use and enjoyment of his land is a private nuisance; W. PROSSER, THE LAW OF TORTS 611 (3rd ed. 1964).

[12] Richards v. Washington Term. Co., 233 U.S. 546 (1914).

[13] Civil Air Regulations § 60.17, 14 C.F.R. § 60.17 (1956).

[14] This interpretation of Sec. 60.17 is developed in Civil Air Regulations, pt. 60, Interp. No. 1, 19 Fed. Reg. 4602, 4603 (1954). This argument is fully developed in Harvey, *Landowner's Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958).

[15] Federal Aviation Act of 1958 § 104, 72 Stat. 104, 49 U.S.C. § 1304 (1964).

[16] *See, e.g.*, Harvey, *Landowner's Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958). This argument is reinforced by the redefinition of navigable airspace in the Federal Aviation Act of 1958 to include airspace necessary for take-offs and landings. Federal Aviation Act of 1958 § 101, 72 Stat. 737, *as amended*, 75 Stat. 467, 76 Stat. 143, 49 U.S.C. § 1301 (1964).

[17] 2 P. NICHOLS, EMINENT DOMAIN § 6.1 (3rd ed. J. Sackman 1963).

constitutional provision,"[18] it is not necessary to divest the owner of his title to or interest in the property. However, the taking must "*substantially* oust the owner from the possession of the land or deprive him of all beneficial use thereof . . . for merely damaging property does not necessarily constitute a taking [Emphasis added.]."[19] It must be noted that, while "taking" applies to the federal government, and to some state governments, the doctrine of "damaging" applies to those states which have amended the eminent domain provisions of their constitutions to provide that property cannot be "taken *or* damaged." This distinction between the federal doctrine of "taking" and the state doctrine of "damaging" is significant, particularly in inverse condemnation cases.

In defining a "compensable damaging," most states have required something more than just an appreciable decline in the market value of land. The Illinois rule is typical:

> [C]ompensation is required not only when there is an injury that would be actionable at common law, but also in all cases in which it appears that there has been some physical disturbance of a right, either public or private, which the owner of a parcel of land enjoys in connection with his property and which gives it an additional value, and that by reason of such disturbance he has sustained a *special damage* with respect to his property in excess of that sustained by the public generally [Emphasis added.].[20]

The application of these concepts varies with each case, but, as stated in *Jensen v. United States*,[21]

> There is, unfortunately, no simple litmus test for discovering in all cases when an avigation easement is first taken by overflights. Some annoyance must be borne without compensation. The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of humans below; and the impact upon animals and vegetable life.[22]

In general, the application of the "taking" doctrine to cases involving landowners' rights in adjacent and surrounding airspace has fallen into two categories: those involving restrictions on the use of land adjacent to airports, usually through the enforcement of zoning ordinances, and those concerning airspace usurped by low and frequent flights.[23] The courts have drawn parallels between the result of low flights over land and restricted height zoning, and have held both to constitute a taking of an avigation easement.[24] Hence, the tests applied and the limitations imposed upon the concept of constitutional taking by low-flying aircraft are relevant in the present case of restrictive height zoning.

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[18] *Id.* at § 6.1(1).
[19] *Id.* at § 6.38.
[20] *Id.* at § 6.441(3).
[21] 305 F.2d 444 (Ct. Cl. 1962).
[22] 305 F.2d at 447.
[23] These are the major categories, but others do exist. Annot., 77 A.L.R.2d 1355 (1961).
[24] Note, 31 J. AIR L. & COM. 366 (1965) developed this distinction; *see, e.g.*, Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth., 111 So. 2d 439 (Fla. 1959).

The only definite limit placed upon the concept of constitutional "taking" is that flights above the minimum safe altitudes prescribed by the Civil Aeronautics Board are immune from liability.[25] However, *Causby* implies a second limitation. As the landowner is entitled to such airspace as he needs for the use of his land, he will be compensated for takings that interfere with this use.[26] One definition of a "taking" of airspace limits claims to those alleging interference with a "reasonable use,"[27] which limits the landowner's ownership:

> to that part of the air as may be effectively possessed by the surface owner, or as is necessary to the *reasonable use* of the surface of the land [Emphasis added.].

Another concept that limits the landowner's recovery was set out in *Causby*: "not every violation of an owner's airspace constitutes a taking. It is only when they (the overflights) are so low and so frequent as to be a *direct and immediate interference* with the enjoyment and use of the land that they constitute a taking."[28] This concept of a "direct and immediate interference" requires that both the character and the degree of the invasion be something more than mere inconvenience or a decline in the market value of the land. This limitation is frequently applied by the courts.[29] A final limitation on the concept of constitutional "taking" is the doctrine of "substantial interference." The Supreme Court of Ohio has stated:

> Under this broad construction (of a taking) there need not be a physical taking of the property or even dispossession; *any substantial interference* with the elemental rights growing out of the ownership of private property is considered a taking [Emphasis added.].[30]

The court here stresses that there can be a non-physical appropriation of

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[25] Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959). These altitudes are 500 feet over noncongested areas and 1000 feet above congested areas. Civil Air Regulations § 60.17, 14 C.F.R. § 60.17 (1956) and 20 Fed. Reg. 6694 (1955).

[26] Aaron v. United States, 311 F.2d 799 (Ct. Cl. 1963), the court commented indirectly on this point at 800:

> But plaintiffs had no use for this air space, except as it contributed to their use and enjoyment of the surface of the ground, and except as it insured against an impairment of their use and enjoyment of the surface of the ground. As long as these flights did not seriously interfere with the use and enjoyment of their properties, the defendant did not impose a servitude upon them for which plaintiffs are entitled to compensation.

Hinman v. Pacific Air Transp., 84 F.2d 755 (Ct. Cl. 1963) at 757-58:

> Title to air space unconnected with the use of land is inconceivable. Such a right has never been asserted. It is a thing not known to the law.
>
> The air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it . . . . We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of the land owns as much of the space above his land as he uses, but only so long as he uses it.

The use which the property owner claims must be more than mere spiteful interference with the airflights. United Airports Co. Ltd. v. Hinman, 1 AV. L. REP. 823 (S.D. Cal. 1939).

[27] 2 P. NICHOLS, EMINENT DOMAIN § 5.781 (3rd ed. J. Sackman 1963). One case used a similar term, "common and necessary use," to limit the applicability of the use concept of *Causby*. Thornburg v. Portland, 233 Or. 178, 376 P.2d 100 (1962).

[28] United States v. Causby, 328 U.S. 256 (1946).

[29] State v. Columbus, 3 Ohio St. 2d 154, 209 N.E.2d 405 (1965).

[30] Smith v. Erie R.R., 134 Ohio St. 135, 16 N.E.2d 310 (1938).

property, *i.e.*, airplane noise, provided the interference complained of is substantial.

Therefore, "reasonable use," "direct and immediate interference," and "substantial interference" are terms that may be used to determine whether there has been a "taking." The basis of all three terms is simply that not every damage to property, nor every invasion of airspace above that property is compensable. As there is no rigid definition of these terms, each case inevitably turns on the question of the degree of the injury sustained.[31] The philosophy of the courts becomes more evident when it is realized that the language of the tests—reasonableness, direct and immediate interference, substantial interference—is drawn from the tort remedy of nuisance,[32] which, as *Atkinson v. Bernard, Inc.*[33] indicates, is based on a balancing of opposing interests:

> At the point where "reasonableness" enters the judicial process we take leave of trespass and steer into the discretionary byways of nuisance. Each case then must be decided on its own peculiar facts, *balancing the interests before the court* [Emphasis added.].[34]

Noting that the two interests to be balanced in airport cases are those of the landowners and those of the traveler, the court continued:

> [r]easonableness is so inherent in the judicial balancing of interests in the airport cases that most of the decisions . . . simply proceed to investigate the facts and then grant or deny relief upon the basis of the reasonableness of one interest yielding to another in a given case. . . . In following such a balancing of interests as a means of reaching a decision, the courts employ nuisance concepts with only a passing gesture in the direction of the laws of trespass.[35]

In contrast to the flexible "reasonable" standard for determining a constitutional "taking," the concept of "damaging" *implies* the rigidity of an "absolute liability" approach. In 1870 Illinois amended the eminent domain section of its constitution to include a "taking *or* damaging" clause; twenty-four other states have followed the lead.[36] This departure from the standards set by the Fifth Amendment was undertaken in an obvious attempt to broaden the sphere of recovery for landowners by avoiding the limitations of a "taking."[37] However, the courts continued to use the balance of interests approach to avoid the logical premise of the "damage" concept, *i.e.*, that *any* ascertainable decline in the market value of property caused by the operation of a public facility (such as an airport) is a justiciable claim.[38]

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[31] 2 P. NICHOLS, *supra* note 27, at § 6.1(1).

[32] For a good example of the language of nuisance, see Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (1954).

[33] Atkinson v. Bernard, Inc., 223 Or. 624, 355 P.2d 229 (1960).

[34] 355 P.2d at 232.

[35] 355 P.2d at 232.

[36] 2 P. NICHOLS, *supra* note 27, at § 6.1(3) n.28.

[37] Brown v. Seattle, 5 W. 35, 31 P. 313 (1892).

[38] 2 P. NICHOLS, *supra* note 27, at § 6.441(1). Also refer to Comment, *Inverse Condemnation in Washington—Is the Lid off Pandora's Box?*, 39 WASH. L. REV. 920 (1964). For a specific Mississippi case see King v. Vicksburg Light Co., 88 Miss. 456, 42 So. 204 (1906).

Recently though, a Washington case, *Martin v. Port of Seattle*, refused to follow this trend; it revivified the original purpose of the "taking or damaging" clause in the Washington constitution. In discounting the importance of the distinction between "taking" and "damaging" the court stated:

> The specific purpose . . . [of the "damaging" clause] is to avoid the distinction attached to the word 'taking' appropriate to a bygone era. It is unnecessary to become embroiled in the technical differences between a taking and a damaging in order to accord the broader conceptual scope intended by the additional language.[39]

While endorsing the original intent which prompted the addition of the "damaging" clause to that state's constitution, the Supreme Court of Washington noted that the concept of "substantial" damage has no application to modern constitutional concepts.[40]

> It [the term "substantial" damage] connotes a balancing of the interests of the public in general against those of the individual. Inherent is the idea that the individual must bear a certain amount of inconvenience and loss of peace and quiet as the cost of living in a modern, progressing society. In eminent domain, and in inverse condemnation, such a balancing does not have to be accomplished as a distinct process, simply because the individual seeks no recovery for his individual suffering, damage, loss of quiet, or other disturbance. These elements of damage are cognizable in a tort action, and such a balancing would thus be necessary. But in inverse condemnation the measure of recovery is injury to market value, and that alone.[41]

It is submitted that the court's sole reliance on injury to market value as the measure of recovery for inverse condemnation amounts to an espousal of an absolute liability concept.

In the instant case, appellants claimed that there was no interference with the reasonable and ordinary use of airspace above the land of the appellees. They contended that "[i]t is difficult to see how wild, uninhabited and unimproved land could have any reasonable and ordinary usable airspace above fifty feet from the ground."[42] Appellants asserted the validity of the zoning ordinance and relied on *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority*,[43] in which the reasonableness of a restricted height zoning ordinance was upheld as a valid exercise of police power. On the other hand, appellees maintained that the "use of airspace above land, at least to the height reasonably required for normal growth

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[39] 391 P.2d 540, 546 (Wash. 1964).

[40] Apparently, it is contemplated that litigants will have one cause of action for permanent damage to land, where it is known that the public use causing the injury will be a permanent public improvement. *See, e.g.*, Cheskov v. Seattle, 348 P.2d 673 (Wash. 1960) where the landowners were denied recovery by the statute of limitations, since the incidental damage complained of by the litigants could have been reasonably foreseen at the time the disturbances first began occurring. Hence, in a suit under the "damage" theory, the landowner's petition must allege all damage, past, present and future, which is reasonably foreseeable, or a later cause of action for such damage may be barred by a statute of limitations.

[41] 391 P.2d at 546.

[42] Brief for Appellant at 14, Jackson Municipal Airport Authority v. Evans, 191 So. 2d 126 (Miss. 1966).

[43] Brief for Appellant at 20, Jackson Municipal Airport Authority v. Evans, 191 So. 2d 126 (Miss. 1966), citing Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth., 111 So. 2d 439 (Fla. 1959).

of trees, is a constitutionally protected property right which cannot be taken or damaged for public use without payment of just compensation."[44] They conceded that the validity of the Airport Zoning Act and the Airport Zoning Order was not at issue, but they maintained that the occupancy by the trees in question was a reasonable and ordinary use of the airspace.

Conspicuously absent from the court's opinion is any mention of the reasonableness of the use of the land, of substantial damage to the land, or of the zoning ordinance as a direct and immediate interference with the use and enjoyment of the land. A reasonable assumption is that the court accepted the appellee's contention that the occupancy by the trees was a reasonable use of the land. Also absent from the opinion was any attempt to distinguish between a "taking" and a "damaging," the court merely concluding that the phrase "taking or damaging" covered the fact situation in the present case. It is unfortunate that the court did not explain its reasoning in the present case. As it stands, the decision leaves many important elements to inference. Seemingly, the present case is in consonance with the opinion in *Martin v. Port of Seattle*, except that the *Martin* opinion expressly disavows the importance of the distinction between "taking" and "damaging," whereas the present case ignores the distinction. While *Martin* returns to the rigid "market-value" test of liability for damage to property, it is uncertain to what extent the present case follows suit. However, considering the facts of the instant case, it is reasonable to assume that the court used the *Martin* test for liability rather than the balancing of interests approach.

It is apparent, then, that there is a wide discrepancy between the results of the application of the "taking" doctrine to inverse condemnation proceedings and the results of the application of the "damaging" concept. This discrepancy involves more than a question of the degree of damage. It is a difference of approach and philosophy, with a balancing of interests controlling one concept and the market value test controlling the other. Perhaps the difference between the two concepts is best illustrated by the manner in which each concept allocates the loss. As developed above, the "taking" test requires more than mere damage to the value of property for a justiciable claim. To be awarded damages a landowner must be substantially ousted from possession or substantially impaired in the enjoyment of his property. The court is given the power to consider private interest and public need in reaching a determination on the basis of reasonableness. The objective is apparently to assure that the abnormally sensitive person will not interfere with the public interest, but the power of the court also includes the hidden danger of arbitrary decisions. Apparently, the philosophy of the "taking" approach is analogous to that philosophy underlying the use of zoning through police power, *i.e.*, to "justify those small diminutions of property rights, which, although within the letter of constitutional protection, are necessarily incident to

[44] Brief for Appellees at 7, Jackson Municipal Airport Authority v. Evans, 191 So. 2d 126 (Miss. 1966).

the free play of the machinery of government."[45] As in zoning, under the "taking" doctrine the private citizen must bear some loss and some inconvenience for the public good.

As a contrast to this, the damaging concept eliminates any question of degree. Proponents of this doctrine would maintain that since the public is the beneficiary of the rights taken or the damage done, the public should bear the cost of their acquisition, whatever the price. The "damage" approach seems superior to that of a "taking" for several reasons. (1) The "damage" approach eliminates the possibility of arbitrary decisions, since reliance on market value produces a more objective procedure for determining the rights of the parties involved. The litigant is therefore in a better position to judge the merits of his complaint. (2) As the *Martin* opinion points out, the "damaging" approach has a built-in procedure for balancing the interests involved. If an individual is abnormally sensitive to noise or other side effects from surrounding airports, the decline in the value of the land will *not* be proportionate to that individual's own personal suffering, which suffering should not be confused with the constitutional issue of property rights.[46] Therefore, the balancing of interests in the "damaging" test eliminates the confusion of tort and constitutional principles one finds in the "taking" approach. (3) The "market-value" test brings the decision of the inverse condemnation cases within the letter and spirit of the state constitutions. The "taking" concept apparently assumes that small claims are not important enough for the public interest to be burdened with, concluding that the public interest requires that small claims be denied while large ones be paid. However, the whole purpose of adding the "damaging" clause was to insure a broader framework of recovery for landowners, without regard to the size of the claim. (4) There is the inequity of one individual's paying twice for the public's benefit, *i.e.*, once through taxes and again through the loss suffered.

The damaging concept is not without its limitations, however. Not only will appraisal of property be more difficult, but "to accept it would give rise to a multiplicity of claims whenever a public improvement was constructed, many doubtless fanciful, but nontheless difficult to meet, and might render the construction of public improvements so inordinately expensive as to retard the development of the state."[47]

Nevertheless, it is submitted that such losses are as much a part of the cost of public facilities as the materials required to construct the runways and the full cost should be borne by the public at large. Hence, it is not necessary that some inconvenience be borne without compensation where that inconvenience results in a measurable decline in the market value of property which can be proven in court.

Linda A. Whitley

[45] This was the policy statement of Holmes, C. J., in Bent v. Emery, 53 N.E. 910, 911 (Mass. 1899).

[46] Martin v. Seattle, 391 P.2d 540, 546 (Wash. 1964).

[47] 2 P. NICHOLS, *supra* note 27, at 6.441(1).

Tariffs — Oversales — Civil Remedy

Oversales, "the failure of air carriers to accommodate at flight time passengers holding confirmed reserved tickets on the flight because space is not available,"[1] is an important problem facing the airline industry today. "The oversale problem is perhaps the most aggravating and traumatic inconvenience that a passenger can be subjected to . . . ."[2] Although "the number of passengers holding confirmed reserved space who are denied boarding is not large relative to total enplanements, the number is substantial in absolute terms."[3] To the airlines, oversold situations mean loss of fares, inefficient use of equipment, and damage to their respective images. To a businessman, it could mean the loss of an important transaction. Although the entire problem has been broadly attacked by both the airline industry and the CAB, plaintiffs have usually sought recovery for damages from oversales either upon contract or tort principles.

I. The Courts' Consideration of the Problem

In those cases in which the action was based on breach of contract,[4] the oversold passenger's recovery has been limited to compensatory damages (the sum of the ticket price and excess baggage assessment paid[5]). In denying recovery for consequential or special damages, the courts have reasoned as follows: All tickets are sold subject to the conditions of contract printed on the ticket and to the tariffs on file with the CAB.[6] The passenger is charged, as a matter of law,[7] with notice of these provisions which form an integral part of the contract. One such provision disclaims any duty on the part of the airline to insure that the passenger arrives at his destination by a given time, *e.g.*, the typical "no particular time is fixed for the commencement or completion of carriage."[8] It is a general rule of contract that:

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[1] CAB Release, Notice of Proposed Rule Making, EDR-109, CAB Docket No. 16563 (10 Jan. 1967).

[2] CAB Press Release No. 67-170, 382-6031 (1967).

[3] *Supra* note 1 at 2. The Board said information before it shows that about 50,000 confirmed reserved space passengers were denied boarding on flights in domestic trunk and local services carriers in both 1963 and 1964.

[4] National Airlines, Inc. v. Allsopp, 182 F.2d 483 (5th Cir. 1950); Trammell v. Eastern Air Lines, Inc., 136 F. Supp. 75 (W.D.S.C. 1955); Jonse v. Northwest Airlines, Inc., 157 P.2d 728 (Wash. 1945).

[5] National Airlines, Inc. v. Allsopp, 182 F.2d 483, 484 (5th Cir. 1950). "Recognizing that it had breached its contract by not providing plaintiff with the passage it had contracted to give him, defendant paid into court the full amount plaintiff had paid for his ticket and for excess baggage." The court found this to be the extent of the airline's liability.

[6] Toepfer, Inc. v. Braniff Airways, 135 F. Supp. 671 (D.C. Okla. 1955); Mustard v. Eastern Air Lines, Inc., 338 Mass. 674, 156 N.E.2d 696 (Mass. 1959); New York & Honduras Rosario Min. Co. v. Riddle Airlines, Inc., 162 N.Y.S.2d 314 (1957), *aff'd*, 149 N.E.2d 93 (1958).

[7] Turoff v. Eastern Air Lines, Inc., 129 F. Supp. 319 (D.C. Ill. 1955); Shortley v. Northwestern Airlines, 104 F. Supp. 152 (D.D.C. 1952); Lichten v. Eastern Air Lines, Inc., 87 F. Supp. 691 (D.C. N.Y. 1949), *aff'd*, 189 F.2d 939 (2d Cir. 1951); Jones v. Northwest Airlines, 157 P.2d 728 (Wash. 1945).

[8] Paragraph 7 of Conditions of Contract of the standard IATA ticket.

> [S]pecial damages cannot be recovered in an action *ex contractu* unless the defendant had notice of the circumstance from which they [the damages] might reasonably be expected to result at the time the parties entered into the contract, as the effect of allowing such damages would be to add to the terms of the contract another element of damages not contemplated by the parties.[9]

This view is in accord with the basic contract principle as initially stated in *Hadley v. Baxendale*.[10] But even if the special circumstances of a given situation have been communicated to the airlines, a new and different contract would *not* result because "the carrier [cannot] bind itself by contract to a greater obligation than permitted under its tariffs."[11] Common carriers "are bound to serve all who come at uniform rates for like services, and . . . cannot withdraw or modify their terms, when appraised of special danger of loss."[12] As a matter of law, they are held to *one standard*, one duty of care to all passengers who pay the one price for their services. Therefore, the carriers cannot be made liable for the consequential damages arising from the unique situation of an individual party, even when the special circumstances have been communicated to the carrier.

The oversold passenger has not been any more successful in obtaining consequential damages when he has based his relief on *tort* principles. In *Fitzgerald v. Pan American World Airways, Inc.*[13] the defendant airline prevented plaintiffs, who were Negroes, from reboarding and continuing to their destination. The plaintiffs brought suit in a federal district court, charging that the defendant's refusal to carry them was a malicious and wilfull violation of the Civil Aeronautics Act, which prohibits all discrimination by an air carrier.[14] While no provision of the act grants an individual the right to recover for damages for injuries caused him by violation of the Act, the court of appeals relying on previous decisions where a civil right had been implied from a criminal statute,[15] held that the criminal statute involved herein implied a new federal civil right for the protection of a specific class of people, of which the plaintiffs were members.

In *Wills v. Trans World Airlines, Inc.*,[16] the *Fitzgerald* decision was

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[9] Trammell v. Eastern Air Lines, Inc., 136 F. Supp. 75 (W.D.S.C. 1955).

[10] 156 Rev. R. 145 (Ex. 1854).

[11] 4 S. WILLISTON, LAW OF CONTRACTS § 1073 (rev. ed. 1937). This is no longer strictly true as to carriage covered by the Warsaw Convention. Article 22, Sec. (1) of Warsaw provides: "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

An argument might be made, as to a Warsaw flight, that if the carrier sold a ticket to a passenger who had communicated the special circumstance to the carrier, and if that passenger was prevented from making the flight because it was oversold, then the carrier would be liable to the full extent of the special circumstances communicated to it.

[12] C. MCCORMICK, LAW OF DAMAGES 570 (1935); *see also* Note, *The Rule in Hadley v. Baxendale*, 16 Law Q. Rev. 275 (1900).

[13] Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956).

[14] Civil Aeronautics Act of 1938, § 404(b), 52 Stat. 973 reads in part: "No air carrier . . . shall make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[15] *See, e.g.*, Bell v. Hood, 327 U.S. 678 (1945); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

[16] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

applied to an oversold situation. In that case, the plaintiff held a confirmed reservation on the defendant's flight from St. Louis to Los Angeles. Although the plaintiff had complied with all tariff requirements, such as confirming his reservation, the defendant airline oversold the flight and consequently "bumped" the plaintiff in favor of a first-class passenger who had purchased his ticket subsequent to the plaintiff. The court, recognizing the validity of the federal cause of action implied in the *Fitzgerald* decision, held that the defendant's action constituted unjust discrimination in violation of section 404(b) of the Civil Aeronautics Act of 1938. In addition to being the first case to apply the prohibition against discrimination to an oversold situation, the *Wills* decision was also significant as to the matter of damages. Because the plaintiff was inconvenienced only to the extent of a four-hour delay on a Sunday afternoon in arriving at his destination and the cost of a telephone call to inform his wife of his delay, the court limited the award for compensatory damages to the amount of the telephone call ($1.60). However, the court awarded him $5000 as *punitive* damages. This was the first instance in which a court allowed punitive damages in a case involving a federal cause of action implied from a criminal statute.[17]

Whether the cases based on contract and tort are still valid is doubtful. One writer[18] has suggested that, in view of the doctrine of primary jurisdiction,[19] these prior cases would not be applicable to instances of overselling today because the CAB has since adopted tariff rules[20] covering oversold situations. Even if this cause of action would still be applicable, the amount of recovery that the courts could grant might now be limited to the amount of recovery provided by the relevant tariff provisions.[21] Although there have been no further cases in this area, two courts,[22] in dicta, have declared this right to still exist (although they made no mention of the matter of damages). However, before an oversold passenger could seek recovery on the basis of these decisions, the element of discrimination must exist, *viz.*, a passenger boarded on the flight must have purchased his ticket subsequent to the plaintiff.

II. The Industry's and the CAB's Consideration of the Problem

At different times the industry and the CAB have, together or separately, sought various solutions to the problem of oversales. A consideration of their attempted solutions requires, first of all, an appreciation of the *causes* of oversales:

[17] *See* Note, *Civil Aeronautics Act—Discrimination—Private Cause of Action for Punitive Damages*, 60 MICH. L. REV. 798 (1962).

[18] *Id.*

[19] This doctrine provides that when Congress has created a regulatory agency to regulate a particular area, the courts, state and federal, are without power or jurisdiction to grant relief to persons complaining of an act done, if that act is within the area of control of such agency; *see* Adler v. Chicago & So. Air Line, Inc., 41 F. Supp. 366 (E.D. Mo. 1941).

[20] *See* discussion of tariffs, in the text, *infra*.

[21] *See, e.g.*, Lichten v. Eastern Air Lines, Inc., 189 F.2d 939 (2d Cir. 1951); Toepfer, Inc. v. Braniff Airways, 135 F. Supp. 671 (W.D. Okla. 1955); Wittenberg v. Eastern Air Lines, Inc., 126 F. Supp. 459 (E.D.S.C. 1954); Mach v. Eastern Air Lines, Inc., 87 F. Supp. 113 (D. Mass. 1949).

[22] Flores v. Pan American World Airways, 259 F. Supp. 402 (D. Puerto Rico 1966); Stough v. North Central Airlines, Inc., 55 Ill. App. 2d 338, 204 N.E.2d 792 (1965).

(1) substitution of lower capacity aircraft because of maintenance or other operational considerations; (2) errors committed by personnel of the carrier denying boarding to the passenger, by personnel of other carriers, and by travel agency personnel, and (3) breakdown or defects in communication, computing and other equipment used in processing reservations.[23]

Other causes are "reservation practices such as 'free-sales' and block ticketing" and, in certain situations, intentional overselling and overbooking.[24] No-shows[25]—passengers who do not use their confirmed reservations—are one of the main causes of overselling; reducing the incidence of no-shows would greatly reduce the economic pressure on the airlines to intentionally oversell.

In trying to solve the no-show problem the airlines have tried three approaches: (1) assessment of a penalty on the no-show passenger; (2) establishment of a minimum time limit (MTL) before a flight in which a passenger must purchase the ticket he has reserved; and (3) requirement of reconfirmation by the passengers of their intention to use their tickets.

Assessment of penalties was first tried in 1948, but lasted only a few months because of non-compliance by some airlines.[26] In 1954, a no-show penalty (20 percent of the one-way fare) applicable solely to coach travel was adopted and a reconfirmation requirement was applied to first-class passengers.[27] Soon thereafter, the airlines dropped the reconfirmation requirement because it only burdened those who did fly and "had no effect on the no-shows."[28]

In 1955, the Air Traffic Conference,[29] after the CAB had brought pressure to bear on the carriers to find a solution to the no-show problem,[30] appointed a special committee that suggested extending the penalty assessment to all classes of passengers. The Conference rejected the suggestion[31] and later eliminated the then existing penalty assessment on coach service.[32] Thereafter, the CAB advised the industry that it would take action if the industry could not agree on a solution to the no-show problem.[33] The industry and the CAB finally agreed upon a three-phase plan involving MTL, reconfirmation, and a $3.00 penalty on no-shows.[34] In

[23] Proposed CAB Eco. Reg. § 109, 32 Fed. Reg. 459 (10 Jan. 1967).

[24] *Id.* It was said in AVIATION WEEK, 23 July 1966, at 38 that "[o]verbooking and overselling flights is a practice developed by some airlines as a calculated risk. Flights are overbooked and oversold in the expectation that no-shows will reduce the number of reservations sold to the number of seats available on the flight." This fact has been recognized by the CAB. "No-shows . . . were conceded by the Board as probably exerting economic pressure on carriers to indulge in overbooking." AVIATION WEEK & SPACE TECHNOLOGY, 23 Jan. 1967, at 39.

[25] One study showed that no-shows amounted to 16% of total passengers enplaned; *see* AVIATION WEEK, 9 July 1956, at 38.

[26] AVIATION WEEK, 26 Sept. 1955, at 20.

[27] AVIATION WEEK, 2 May 1955, at 98.

[28] *Id.* Actually, no-shows increased 50% to 60% after the airlines discontinued the reconfirmation practice; *see* AVIATION WEEK, 8 Aug. 1955, at 101.

[29] The Air Traffic Association is divided in working groups such as the Public Relations Conference and the Finance and Accounting Conference. The Air Traffic Conference is the working group devoted to the problems such as scheduling, reservations, etc.

[30] AVIATION WEEK, 2 May 1955, at 98.

[31] AVIATION WEEK, 22 Aug. 1955, at 101.

[32] AVIATION WEEK, 26 Sept. 1955, at 20.

[33] AVIATION WEEK, 18 June 1956, at 25.

[34] AVIATION WEEK, 9 July 1956, at 38; AVIATION WEEK, 27 Aug. 1956, at 43; AVIATION WEEK, 28 Jan. 1957, at 40; AVIATION WEEK, 18 Nov. 1957, at 41.

1958, the Air Traffic Conference once again voted to drop the penalty,[35] but by 1962 the penalty was back in vogue. The CAB in that year agreed to a no-show penalty of 50 percent of the first unused flight coupon with a minimum of $5.00 and a maximum of $40.00,[36] which proved effective in handling the no-show problem.[37] However, in spite of its success and the CAB's desire for permanent adoption,[38] it was discontinued in 1963 primarily because of the public sentiment against it.[39]

In 1962, when the industry proposed a penalty of 50 percent of the ticket price, with a minimum of $5.00 and a maximum of $40.00 on no-shows, the CAB agreed, provided the industry would agree to a like penalty to be paid by them to an oversold passenger denied boarding.[40] This tariff, which granted compensation to an oversold passenger, further provided that the airline must (1) transport the oversold passenger on its next flight on which space was available at no additional cost to the passenger, regardless of the class of service, or (2) re-route the passenger on another carrier at no additional cost, whichever would provide the earliest arival at the passenger's destination, next stopover point, or transfering point.

In January 1967, the CAB proposed substantial rule changes in this area,[41] which were adopted 3 August 1967. The Board, realizing the "substantial inconvenience and hardships"[42] suffered by an oversold passenger, felt that it should "take positive steps to assure prompt, effective, and adequate compensation"[43] to such passengers. As it believed that the previous level of compensation "fell far short of being adequate,"[44] the Board changed Section 250 of the Economic Regulations to provide for compensation equal to 100 percent of the value of the first remaining flight coupon with a minimum of $25.00 and a maximum of $200.[45] Significantly, the new rules also provide, *inter alia*, that the carriers must file with the CAB (1) priority rules and criteria used in determining which oversold passenger will be denied boardage,[46] and (2) reports of all overbooked pas-

[35] Only 3 of the 25 confeernce members wanted to drop the plan. The other 22 had to go along for competitive reasons. However, they did appeal to the CAB for help to retain the plan, but to no avail. It was discontinued; *see* AVIATION WEEK, 4 Aug. 1958, at 40.

[36] AVIATION WEEK, 15 Jan. 1962, at 38.

[37] This penalty cut no-shows 25-45%; *see* AVIATION WEEK & SPACE TECHNOLOGY, 9 July 1962, at 28.

[38] AVIATION WEEK & SPACE TECHNOLOGY, 1 Oct. 1962, at 30.

[39] *See* AVIATION WEEK & SPACE TECHNOLOGY, 23 Jan. 1967, at 39.

[40] *See* AVIATION WEEK, 15 Jan. 1962, at 31. This compensation was considered to be liquidated damages, which if accepted, would constitute full compensation for all actual or anticipatory damages incurred or to be incurred by the passenger. CAB Tariff No. 43, Sec. VI; CAB, Economic Regulations § 250 (1967).

[41] Proposed CAB Eco. Reg. § 109, 32 Fed. Reg. 459 (10 Jan. 1967).

[42] *Id.* at 460.

[43] *Id.*

[44] *Id.*

[45] This provision will not apply to persons in international travel if the overselling airline can arrange for the oversold passenger to arrive at his next stopover point not later than four hours after the planned arrival of the plane on which he held a ticket. Nor will this apply to a person in domestic flight, if the delay is less than two hours in getting to his stopover point. Nor does this tariff apply if the passenger is denied boardage because of (1) Government requisition of space, or (2) substitution of equipment of lesser capacity required by operation and/or safety reason. CAB, Economic Regulations § 250.6 (1967).

[46] CAB, Economic Regulations § 250.3 (1967).

sengers.[47]

These new rules will, hopefully, do much to solve various aspects of the oversold problem.[48] They provide compensation to an injured passenger that is probably more commensurate with the injury actually suffered by him. As they extract a greater penalty from the overselling airline, it may be influenced to exercise tighter controls on its procedures. Of equal significance, the new rules will provide the CAB with more complete knowledge of the problem, which will enable it to determine whether different regulations are necessary and if so, the form they should take.

The problem of no-shows still exist; it is in turn the main cause of the problem of overbooking, the complete solution of which must necessarily direct itself to the former. A no-show situation may arise (1) when a passenger, unable to use his reservation, fails to notify the airline or, (2) when a passenger, reserving space on several airlines, decides only at the last minute which flight he will take (multiple booking).[49] In spite of these factors, studies show the incidence of no-shows to be within the airlines' ability to control.[50] Consequently, the industry should once again direct itself to this problem and take action to, at least, reinstate the penalty and if the airlines cannot reach unanimity on this course of action, the CAB should intervene.

As to the other causes of overbooking mentioned above (operational considerations and the human element) these probably cannot be controlled to any greater degree than that which exists at the present time. However, the importance of the communications breakdown aspect will undoubtedly become less important, as data processing equipment and techniques continue to improve.[51] At work now, or soon to be, are such developments as (1) the changeover to a completely computerized reservation system;[52] (2) the connection of travel agents' offices directly to the airline's reservation computer;[53] (3) a joint computer system for all interline booking;[54] and (4) the proposed industry-wide computer system.[55] Such developments should contribute significantly to the control and improvement of the oversales problem.

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[47] CAB, Economic Regulations § 250.10 (1967).

[48] These new rules, "the Board believes, will result in tightening up reservation and ticketing procedures with a resultant reduction in the number of oversales." CAB Press Release No. 67-170, 382-6039 (1967) at 4.

[49] *See* Ruppenthal, *Bumping the Passenger*, 190 NATION 551 (1960). Multiple bookings, in some instances, are caused by the very thing designed to counteract them, *i.e.*, oversales. Realizing that airlines oversell flights to protect themselves against the contingencies of no-shows, the passenger wanting to protect himself from the contingency that he may be denied boardage because the plane is oversold will make multiple bookings to assure himself of transportation.

[50] *Supra* notes 29, 33, and 36.

[51] "[T]he use of more advanced computers in the handling of reservations should result in a further decrease in oversales."

[52] *See* AVIATION WEEK, 14 Aug. 1961, at 45.

[53] See The Wall Street Journal, 3 Aug. 1967, at 6, col. 1.

[54] *See* AVIATION WEEK, 14 Aug. 1961, at 46.

[55] AVIATION WEEK & SPACE TECHNOLOGY, 10 July 1967, at 40.

Federal Aviation Act — Statutory Interpretation — Remedies

The plaintiff, who was injured when the private plane in which he was traveling crashed while attempting a night landing, brought suit against the pilot and co-owners of the plane. The petition alleged that the aircraft was operated in violation of several regulations,[1] which violations proximately caused the crash. The plaintiff further asserted (a) that the federal court had jurisdiction[2] because the action arose under the Federal Aviation Act[3] of 1958 and (b) that the court could imply a remedy therefrom. *Held, Dismissed*: The court will not imply a federal civil remedy from the violation of a Civil Air Regulation of safety. Because the plaintiff failed to state a federal cause of action upon which relief could be granted, he must seek his remedy in the state courts. *Moungey v. Brandt*, 250 F. Supp. 445 (W.D. Wis. 1966).

While some federal courts have refused to allow a federal remedy for actions based on violations of regulatory acts which do not expressly provide a means of relief, other federal courts have based a remedy on regulatory acts even where they do not provide for express relief. In the latter situation the courts have implied that Congress intended to create a civil remedy.

In *Texas & Pac. Ry. v. Rigsby*,[4] the Supreme Court first implied a cause of action for a statutory violation when a railroad employee was injured by the railroad's violation of the Federal Safety Appliance Act.[5] Since then, this and other acts have been found *not* to imply a private cause of action.

One approach courts have used to determine whether an act was meant to provide, indirectly, for civil remedies, is to consider legislative intent. For example, in *Jacobson v. New York, N.H. & H.R.*,[6] in which the Supreme Court decided that the Safety Appliance Act, rather than creating a new right, only imposed a higher standard of care in suits based upon the common law, the Court examined the construction of the Act in order to determine the intent of Congress. It concluded that if Congress had intended to create a new cause of action in favor of parties not cov-

[1] 14 C.F.R. § 61.47(b) (1967):

> No person may act as pilot in command of an aircraft carrying passengers during the period beginning 1 hour after sunset and ending 1 hour before sunrise unless, within the preceding 90 days, he has made at least five takeoffs and five landings to a full stop during that period of the day. This period does not apply to operations requiring an airline transport certificate.

[2] [W]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions [where the claim is immaterial or insubstantial] . . . must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

Bell v. Hood, 327 U.S. 678, 681-82 (1946).

[3] 72 Stat. 731, 49 U.S.C. § 1 (1946).

[4] 241 U.S. 33 (1916).

[5] 27 Stat. 531 (1893), *as amended*, 45 U.S.C. § 1 (1958).

[6] 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

ered by the Employers' Liability Acts,[7] it would have included provisions regarding venue, jurisdiction, statute of limitations, damages, and beneficiaries. In determining legislative intent, courts have also looked to the existence of Congressionally created agencies which administer the regulations of the act involved. In *Montana-Dakota Utils. Co. v. Northwestern Public Serv. Co.*,[8] the Supreme Court did not imply a cause of action from the Federal Power Act[9] reasoning that since Congress gave the Federal Power Commission the right to set the rates, it did not intent to provide for court inquiry into the rates. Also, some courts have determined congressional intent by applying a rule of construction to the text of the statute, *e.g.*, the rule of "expressiounis"[10] was applied to the Motor Carrier Act,[11] which provided only for criminal penalties and injunctive remedies, but was silent as to any private remedy for a violation of any of its provisions.[12]

In those instances in which a court *has* extended a civil remedy to a person injured by a defendant's breach of a federal regulation that did not expressly provide for such relief, it has *always* found the defendant to be in the class of people for whose protection the regulation was enacted. The Restatement (Second) of Torts states that:

> [T]he court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose if sound to be exclusively or in part to protect a class of persons which includes the one whose interest is invaded. . . .[13]

The courts have interpreted this statement as a creation of a *new* cause of action rather than raising the existing standards of a previous cause of action. Consequently, this section alone has been used as a basis for implying a cause of action.[14] In those situations where there is a lack of a previous common law duty, some courts have been inclined to imply a cause of action. Thus, it has been held that the Federal Communications Act[15] created both criminal and civil liability for the publication of an intercepted telephone conversation because there was no previous common law remedy for such an act. Similarly, in *Turnstall v. Brotherhood of Locomotive Firemen*,[16] the Supreme Court found that the breach of a duty created by the Railroad Labor Act[17] was sufficient to imply a federal action even though there was no previous common law duty. However, the court limited the concept to violations of the Act in which no administrative remedies were available. Finally, many courts have construed regulatory

[7] 35 Stat. 64, 45 U.S.C. § 51 *et. seq.* (1908).
[8] 341 U.S. 246 (1951).
[9] 41 Stat. 1063, 16 U.S.C. §§ 791a-825r (1920).
[10] Expression of one thing is the exclusion of another.
[11] 54 Stat. 899 (1920), *as amended*, 49 U.S.C. §§ 301-27 (1964),
[12] Consolidated Freight-Ways, Inc. v. United Truck Lines, Inc., 216 F.2d 543 (9th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955).
[13] RESTATEMENTS (SECOND) OF TORTS § 286 (1965).
[14] Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960); Kardon v. National Gypsum, 69 F. Supp. 512 (E.D. Pa. 1946).
[15] 162 F.2d 691 (2d Cir. 1947).
[16] 323 U.S. 210 (1944).
[17] 48 Stat. 1185, 45 U.S.C. §§ 151 *et. seq.* (1934).

acts as sources of implied actions when the activities involved was interstate, *viz.* when a uniform remedy was desirable.[18]

In the area of air regulations, the courts have generally used one of the aforementioned rationales in order to imply a cause of action. For example, in *Neiswonger v. Goodyear Tire & Rubber Co.*[19] the court followed the Restatement view and implied a civil cause of action from a violation of the Air Commerce Act of 1926,[20] when the plaintiff was in the class of people for whose protection the regulation was enacted. Another criteria employed in the air law area is the absence of an administrative agency or agency authority to award civil damages for violations of the Federal Aviation Act. In *Wills v. Trans World Airlines*[21] the court stated:

> [T]he first consideration which argues that a Federal cause in the behalf of the passenger fulfills a major purpose of the act is the fact that, although the statute confers upon the administrative agency power to investigate and render prospective relief to protect from impending statutory violation, there is no administrative authority to award damages or other relief to a passenger for past wrongs.[22]

The *Wills* court, which found the basis for the federal cause of action was a section[23] of the Federal Aviation Act forbidding discrimination or undue preference as to passengers, relied in part on *Fitzgerald v. Pan American World Airways.*[24] There, the plaintiffs alleged that they were removed from a flight because of their race and the court implied a civil remedy after application of the criteria of congressional intent and a national interest in uniformity.

In summary, the courts have used the following standards or tests in implying a cause of action from a violation of a civil air regulation: (1) legislative intent, as evidenced by the absence of an administrative agency or authority to provide a relief; (2) the Restatement (Second) of Torts rule; (3) the absence of a state court remedy; or (4) a national interest in uniformity.

In those cases where courts have *refused* to imply a federal cause of action from the Federal Aviation Act, they have employed additional standards. In *Dennis v. Southeastern Aviation, Inc.*,[25] where the action was commenced in a state court and removed to the federal court, it was held that if the cause of action to be implied from a violation of the Federal Aviation Act was subject to the removal jurisdiction of the federal courts, no civil remedy could be implied, *i.e.*, there must be *exclu-*

[18] *See, e.g.*, Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Hooper v. Mountain States Sec. Corp., 282 F.2d 195 (5th Cir. 1960); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

[19] 35 F.2d 761 (N.D. Ohio 1929).

[20] 44 Stat. 568.

[21] 200 F. Supp. 360 (S.D. Cal. 1961).

[22] 200 F. Supp. at 364.

[23] Federal Aviation Act of 1958 § 404(b), 72 Stat. 760, 49 U.S.C. 1374(b) (1964):
> No air carrier or foreign air carrier shall make, give, or cause any undue or reasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice of disadvantage in any respect whatsoever.

[24] 229 F.2d 499, 502 (2d Cir. 1955).

[25] 176 F. Supp. 542 (E.D. Tenn. 1959).

sive jurisdiction before the court would even consider whether to imply a federal cause of action. Additionally, some cases have refused to imply a federal cause of action when the plaintiff has brought suit for a deceased relative, because they reason the plaintiff has no right to sue in the absence of a federal wrongful death statute.[26]

In the present case, the court took encouragement from existing case law, particularly from *Dennis* in regard to absence of exclusive federal jurisdiction and other decisions involving the lack of a federal wrongful death statute. It distinguished *Wills* and *Fitzgerald* because in those cases the state court remedies were inadequate and, thus, a federal remedy was needed to correct violations of civil rights sections of the Act. The court also declined to follow *Neiswonger.*

> [W]*hen no national interest compels* that certain litigation be brought to the federal court, when a wholly satisfactory state forum is available to the parties, and when the Constitution of the United States and the federal statutes permit the federal court to choose whether to receive the case, there is much to be said for withholding a federal remedy. [Emphasis added.].[27]

In addition, the court reasoned that were a federal cause of action implied, the federal courts would be required to develop a body of common law rules to deal with the issues of last clear chance, contributory negligence, proximate cause and others.

However, in declining to imply a remedy, the court did not take into consider some matters that may be materialized in other decisions, *e.g.*, (1) a national interest in uniformity and (2) an inadequacy in plaintiff's remedies. This national interest has been emphasized in two ways. First, as discussed previously in the cases dealing with interstate activities, the courts have implied a cause of action from regulatory acts in order to obtain uniform results—both private and public aviation are ever-increasing interstate activities which demand this uniformity of regulation.[28] Second, Congress passed the Federal Aviation Act in order to insure and promote safety in the field of aviation through the use of uniform and higher safety standards.[29] As *Fitzgerald* noted, "Congress sought uniformity in the practices of those subject to this Act."[30]

Another significant matter that the court failed to consider in detail was the possibility of an inadequate remedy for a plaintiff. The court stated that, "[n]o inadequacies in the state remedy have been called to our attention, and we are aware of none,"[31] but, there was an inadequacy

[26] Porter v. Southeastern Aviation, Inc., 191 F. Supp. 42 (M.D. Tenn. 1961); Fernandez v. Linea Aeropostal, 156 F. Supp. 94, 99 (S.D.N.Y. 1957): "The act . . . might establish a standard of care" where no wrongful death but just an injury. Southeastern Aviation, Inc. v. Hurd, 355 S.W.2d 436 (Tenn. 1962).

[27] Moungey v. Brandt, 250 F. Supp. 445, 451 (W.D. Wis. 1966).

[28] "The fastest growing segment of civil aviation for some years has been general aviation (nonairline & nonmilitary aviation)." FEDERAL AVIATION AGENCY, 8TH ANNUAL REPORT TO THE PRESIDENT AND TO THE CONGRESS 81 (1966).

[29] "Aviation safety is the Federal Aviation Agency's primary mission . . . ." FEDERAL AVIATION AGENCY, 8TH ANNUAL REPORT TO THE PRESIDENT AND TO THE CONGRESS 1 (1966).

[30] 229 F.2d 499, 502 (2d Cir. 1955).

[31] 250 F. Supp. 445, 451 (W.D. Wis. 1966).

in the state court remedy: the lack of a co-ownership liability statute in Wisconsin. In opposition to motions to dismiss, the plaintiff urged the application of Sec. 101[32] of the Federal Aviation Act, which provides for the liability of absent co-owners of aircraft. Since plaintiff's attempt to bring in additional defendants indicated the defendant-pilot's inability to satisfy a possible judgment, certainly an unsatisfied judgment against an insolvent defendant would be an "inadequate remedy."

The *Moungey* court also left unexplored a further possible deficiency in the state court remedies. As stated in a legal periodical relied on by the court, "[I]n some areas the inadequacy of the state court remedy may lie not so much in their individual deficiencies as in their local nature and diversity."[33] The diversity of state court approaches to proof and liability has resulted in different conclusions in airline crash cases. In particular, rules of evidence have an important effect on the outcome of negligence cases involving airplane crashes because of the inherent limitations of proof, *e.g.*, destruction of the aircraft and likely death of its passengers. For example, it is well established that the use of *res ispa loquitur*, as an alternative to evidentiary proof, has been generally unsuccessful in airline crash cases.[34] This difficulty is minor when compared to the wide diversity of state rules concerning admissibility of the civil air regulations as evidence in state courts. Some states have held that a violation of a safety regulation is negligence *per se*[35] while a few states admit it as some evidence of negligence.[36] These differences in standards of care naturally produce different results. Similarly, in the case of uniformity some jurisdictions have ownership liability statutes, while others do not.[37]

Finally, the possible inability of the plaintiff to join all defendants in one action reflects the inequity of confining him to state court. When an accident involves as possible defendants one or two aircraft owners, the manufacturer, and the United States Government in the operation of its control tower facilities, where no diversity of citizenship exists between parties, and the Government is an essential party, then federal jurisdiction as implied from the Federal Aviation Act may be the only method of gathering together all the defendants in one action.[38]

In addition to believing that the state remedy was adequate, the instant court was of the opinion that:

"[t]he national interest in safety in civil aeronautics is adequately protected

[32] 72 Stat. 737, 49 U.S.C. § 1301(26) (1964): "Operation of Aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control, (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this Act.

[33] Comment, *Implying Civil Remedies from Regulatory Statutes*, 77 HARV. L. REV. 285, 293 (1963).

[34] McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 27 VA. L. REV. 55 (1951), in which it is indicated that as of 1951, of 24 airline crash cases tried by plaintiffs on a res ipsa loquitur basis, 22 had resulted in judgments for the defendants.

[35] Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *cert. granted, rev'd on other grds.*, 350 U.S. 907 (1955).

[36] Citrola v. Eastern Airlines, Inc., 264 F.2d 815 (2d Cir. 1959).

[37] L. KREINDLER, AVIATION ACCIDENT LAW 173 (1963).

[38] *Id.* at 531.

> by the network of statutory and administrative procedures and sanctions expressly created by the Federal Aviation Program. . . ."[39]

Although this protection is achieved by conferring upon the administrative agency the power to investigate and render *prospective* relief, the federal court places the burden of granting relief for *past* violations on state courts. This is because there is no administrative authority to award damages or other relief to those injured by past violations of the federal act. As discussed previously, this lack of an administrative agency to award damages is a sufficient basis for implying that Congress intended to create a new cause of action.[40]

While the holding of the instant court cannot be deemed definitely incorrect (because the state remedy was seemingly adequate) there are strong arguments that available state court remedies, as a whole, were inadequate. It is submitted that a broader, more nationally-oriented outlook by the court would have produced a result that would better protect all of the interests of civil aeronautics. The uniform implication of a cause of action could cure many existing deficiencies in the state court remedies and also increase the likelihood of compliance by potential violators, who would be faced with an additional or more uniform penalty. The least the court could have done was to follow *Jacobson v. New York, N. H. & H. R.*[41] which imposed a higher standard of care in suits based on a common law right. Such an approach would serve to relieve the federal court from developing a body of common law rules and, to a lesser degree, it would solve the problem of uniformity by imposing a higher standard of care upon the states' common law duties. Indeed, this has been the result of the decision in *Jacobson*.[42] If the *Moungey* court's rationale is followed and the public waits until a "compelling national interest" is present, then many people will possibly suffer from the variety of state court deficiencies.

James Lee Irish III

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[39] 250 F. Supp. at 451.

[40] *Supra* note 22.

[41] 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

[42] Atlantic Coast Line Ry. v. Dirmvant, 365 Ala. 423, 91 So. 2d 670 (1956). "After further study we are of the opinion that a count seeking damages because of the Safety Appliance Act need not contain the formal charge of negligence. "Cases of this kind are governed by acts of Congress and by federal decisional law. . . . Jacobson v. New York, N.H. & H.R. Co., 1 Cir., 206 F.2d 157." Garner v. Pacific Electric Co., 202 Cal. App. 2d 720, 21 Cal. Rptr. 352, 360 (1962).

Sonic Booms — FTCA — Waiver Of Discretionary Exception

Plaintiff alleged that damage to his apartment building (broken windows, cracks in a plaster wall, and squeaks in floors and stairways) resulted from sonic booms, which were caused by the supersonic flight of Air Force B-58 bombers. The planes were on training missions prescribed by the Strategic Air Command Training Manual and were operated in the Minneapolis air corridor, which extends from Minot, North Dakota, to a point just beyond Minneapolis.[1] The plaintiff argued that there was a substantial causative factor involved and that the Government was liable either under the Federal Tort Claims Act for negligence[2] or through the Tucker Act on the constitutional theory of an uncompensated taking.[3] Prior to the trial the Government *stipulated*, as a result of a motion by the plaintiff to strike certain defenses, that the court had jurisdiction under the Federal Tort Claims Act.[4] At the trial, however, the defendant argued that the stipulation was inapplicable, on the grounds that the court lacked jurisdiction,[5] that the plaintiff failed to establish negligence under the Federal Tort Claims Act, and that the overflights in themselves did not constitute a "taking" within the meaning of the Constitution. *Held*: There was no jurisdictional question because the pre-trial stipulation effectively waived the Government's "discretionary exception." Although there was neither a taking that would justify a ruling under the Fifth Amendment nor negligence in the operation of the aircraft, there *was* negligence in *placing* the air corridor in its particular location for which the Government was held to be liable. *Neher v. United States*, 265 F. Supp. 210 (D. Minn. 1967).

A variety of theories have been suggested for the recovery of sonic boom damages: strict liability, negligence, ultrahazardous activity, trespass, and nuisance.[6] However, in litigation against the United States remedies are limited to those which are specifically permitted by it.

One method often used for the recovery of damages against the United States is that of an uncompensated taking or inverse condemnation under the Fifth Amendment.[7] The Tucker Act endows the District Court and the Court of Claims with jurisdiction over controversies not exceeding $10,000, if such claim is based on the Constitution, any act of Congress, any regulation of an executive department, any express or implied con-

[1] An air corridor is usually twenty nautical miles wide and three hundred to six hundred nautical miles long. The plaintiff's building is eight to ten miles from the center line of this particular corridor.

[2] Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1964).

[3] Tucker Act, 28 U.S.C. § 1346(a)(2) (1964).

[4] Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1964).

[5] Discretionary Function Exception, 28 U.S.C. § 2680(a) (1964).

[6] Note, *Sonic Booms—Ground Damage—Theories of Recovery*, 32 J. AIR L. & COM. 596 (1966); Note, *Federal Liability for Sonic Boom Damage*, 31 S. CAL. L. REV. 259 (1958).

[7] U.S. CONST. amend. V, provides, in part: "nor shall private property be taken for public use, without just compensation."

tract with the United States, or is the result of liquidated or unliquidated damages which do not fall under the classification of a tort. Applying this act through the Fifth Amendment, a civil suit may be brought against the United States for damages caused by a taking and the Government will not be permitted to raise the defense of sovereign immunity.

The courts usually have granted only limited recovery for damages in this area. In 1946, what appeared to be a major breakthrough came in the decision of *United States v. Causby*,[8] involving the frequent recurrence of low flights by military aircraft above the plaintiff's house and chicken farm. The Court found that these flights caused the destruction of the use of the property as a chicken farm; it ruled that such flights must be *low and frequent* before they may constitute a violation of private property rights.[9] These conclusions were reaffirmed in a more recent decision by the Supreme Court, *Griggs v. Allegheny County*.[10] Most courts have followed these particular decisions stringently, allowing recovery *only* when there is an actual trespass as the result of overflights. Without such a violation of property rights, claims have been denied, regardless of the noise, vibration, or other discomforts which the testing of jet engines, or the landing and taking off of jet aircraft have caused.[11]

Because of the holding in *United States v. Causby*,[12] that flights must be frequent and low, it is obvious that the Fifth Amendment remedy is not available in the instant case. Flights at 30,000 feet could never be thought of as "low," particularly when flights over cities are only required to be 1,000 feet above the tallest object.[13] Neither could these flights be deemed "frequent" when they occurred approximately once per week for a short period of eight weeks.

An alternative means for recovering damages from the United States is the Federal Tort Claims Act.[14] Congress provided this remedy in order to permit the suit to be brought at the plaintiff's residence, to lessen the case load of the Court of Claims, to speed the determination of such cases,

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[8] 328 U.S. 256 (1946).

[9] United States v. Causby, 328 U.S. 256, 266 (1946).

> The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.

[10] 369 U.S. 84 (1962).

[11] Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

In the Batten case, particularly, the court defines the limits on the interpretation of the Fifth Amendment. At 583 it is stated:

> In construing and applying this constitutional provision the federal courts have long and consistently recognized the distinction between a taking and consequential damages. In *Transportation Company v. Chicago*, 99 U.S. 635, 642, 25 L.Ed. 336, the Supreme Court held that governmental activities which do not directly encroach on private property are not a taking within the meaning of the Fifth Amendment even though the consequence of such acts may impair the use of the property. The principle was repeated in *United States v. Willow River Power Co.*, 324 U.S. 499, 510, 65 S.Ct. 761, 89 L.Ed. 1101, the court saying that "damage alone gives courts no power to require compensation."

[12] 328 U.S. 256 (1946).

[13] 14 C.F.R. §§ 91.79, 91.119 (1967). Courts have considered this area above the 1,000 foot mark to be in the public domain. United States v. Causby, 328 U.S. 256 (1946).

[14] 28 U.S.C. § 1346(b) (1964).

and also to relieve Congress of the burden of considering private bills.[15] Under the Federal Tort Claims Act, the United States is liable if a private person under the same or similar circumstances would also be liable. However, certain exceptions extensively limit the meaning of the prior sentence. Perhaps the most important of these limitations is the "discretionary function" exception,[16] the effect of which is to differentiate between the operational and planning levels of administration, *viz.*, the Government will not be liable for acts performed at the planning level.[17]

Several decisions have considered the difference between a planning and an operational function. However, no rule of application has yet been devised which clearly separates the two; nor has any consistent trend developed to point out which acts will be defined as planning functions and which will be considered operational.[18] However, a stricter interpretation of the planning function has been inferred in circumstances involving personal injuries that result from a non-military activity or an activity that does not involve the interests of the national defense. Judgments resulting from negligence in the performance of air traffic control functions, which are civil in nature, can be contrasted with those handed down as the result of supersonic flight damage, a military function carried on in the interest of national defense. While the former decisions usually allow recovery, the latter decisions are to the contrary.[19] The functions are parallel because they both involve decisions of federal employees acting under a stated code of regulations, but the courts have found that one function is operational while the other is planning.[20] In the instant case it was un-

[15] 28 U.S.C.A. § 1346 n.7 (1967).

[16] 28 U.S.C. § 2680 (1964).

[17] Discretionary Function Exception, 28 U.S.C. § 2680(a) (1964).

> based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused.

[18] Dalehite v. United States, 346 U.S. 15, *reh. denied*, 346 U.S. 841 (1953), *reh. denied*, 347 U.S. 924 (1954).

> It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Dalehite v. United States, *supra* at 35-36.

[19] Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956); United States v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955); Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965), *aff'd*, 281 F.2d 965 (9th Cir. 1967); Huslander v. United States, 234 F. Supp. 1004 (W.D. N.Y. 1964); Aero Enterprise, Inc. v. American Flyers, Inc., 167 F. Supp. 239 (N.D. Tex. 1958); Schwartz v. United States, 38 F.R.D. 164 (D.N.D. 1965).

[20] In Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965), suit was brought on behalf of decedent for damages of his death resulting from an airplane crash caused by wake turbulence. The traffic controller had given all warnings prescribed by the federal manual, yet the government was found liable for the failure of its employee to go beyond the manual and give warnings which he should have known to be proper. Thus the court held that the function of an air traffic controller is operational. In contrast, in Huslander v. United States, 234 F. Supp. 1004 (W.D.N.Y. 1964), suit was brought for injuries suffered from a sonic boom, which caused an open window to slam, the glass to break, and plaintiff to be cut. The Government pleaded the defense of "discretionary function;" proved its case based upon affidavits which established that the Air Force Manual provided for supersonic flights and that the pilot was not to go into such flight, unless specifically ordered, or in his discretion, it was necessary because of an emergency situation. The court found that the regulations as set out in the Air Force Manual, as well as the judgment of the pilot in time of emergency, both fall within the confines of Sec. 2680(a), the discretionary exception, protecting the Government from liability by denying the plaintiff the benefit of suit under the Federal Tort Claims Act.

necessary to decide whether or not the function was operational because the defendant, by prior stipulation, had waived its "discretionary function" defense.[21]

Under the Federal Tort Claims Act negligence must be established before recovery of any alleged damages will be permitted.[22] In the instant matter plaintiff failed to carry the burden of establishing that the flights were incorrectly executed, *i.e.*, the evidence showed that the *flights* were performed in a non-negligent manner, at the proper altitude, in conformance with Air Force Regulation 55-34, which governs such activity. However, because there was evidence which established that such flights *could* have been performed in sparsely populated areas at no added inconvenience, and with the same military benefit, the court found that the *decision* to place the supersonic corridor over a densely populated area was negligent.[23]

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[21] The Government sought to establish that the exceptions listed in Sec. 2680 of the Federal Tort Claims Act were jurisdictional and could not be waived, thus rendering the court powerless to adjudicate the matter. The basis of this line of defense rests upon two appellate court opinions and a number of recent district court decisions. The substance of this argument is that Congress has established a limited area in which claims will be heard by the district court; if the subject matter is outside this exclusive area, the court lacks jurisdiction; the language used in the introduction of Sec. 2680 is self-limiting and jurisdictional in tone, thus it cannot be waived and may be raised at anytime during the proceedings. Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 342 U.S. 843, *reh. denied*, 342 U.S. 874 (1951).

> Congress has denied jurisdiction to the district courts for the adjudication (1) of any claim based upon an act or an omission of a government employee, exercising due care, whether or not the statute or regulation is valid, and (2) of any claim based upon the performance or failure to perform a discretionary function or duty on the part of a government agency or employee, whether or not the discretion involved be abused.

Sickman v. United States, *supra* at 619. In United States v. Taylor, 236 F.2d 649 (6th Cir. 1956), *cert. denied*, 355 U.S. 801 (1957) at 652 it was stated, "it seems obvious that the exception to Federal Tort Claims Act liability contained in 28 U.S.C.A. sec. 2680 are jurisdictional." *See also* Swanson v. United States, 229 F. Supp. 217 (N.D. Cal. 1964); Sisley v. United States, 202 F. Supp. 273 (D. Alas. 1962). However, the argument raised by the plaintiff and adopted by the court interprets Sec. 2680 as mere language of limitation in the nature of an affirmative defense that must be pleaded and proven; this reasoning is supported by decisions at both the district and circuit court levels. Stewart v. United States, 199 F.2d 517 (7th Cir. 1952), *cert. denied*, 341 U.S. 940 (1950).

> In our view, Sec. 1346(b) conferred general jurisdiction of the subject matter of claims coming within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven.

Stewart v. United States, *supra* at 519. In this decision the court refers to *Ex Parte* Feres v. United States, 340 U.S. 135, 138, 140 (1950), where the court speaks of Sec. 1346(b):

> The Act does confer district court jurisdiction generally over claims for money damages against the United States founded on negligence. . . . This confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists. . . . Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

Stewart v. United States, *supra* at 519. Smith v. United States, 155 F. Supp. 605 (E.D. Va. 1957) states at 612:

> In addition, sec. 1346(b) has been construed as conferring general jurisdiction on federal courts of the subject matter of claims coming within its purview and that the exceptions referred to in sec. 2680(a) are available to the Government as a defense only when aptly pleaded and proven.

[22] Federal Torts Claim Act, 28 U.S.C. § 1346(b) (1964).

[23] Neher v. United States, 265 F. Supp. 210, 217 (D. Minn. 1967).

> The record shows *no compelling necessity* to plot supersonic corridors over or near permanent bases or populated areas. Thus, I conclude the United States was negligent in designating and using a supersonic corridor over the Minneapolis-St. Paul area

The problems raised in this decision are related to the whole area of damages suffered as the result of noise, vibration or shock waves. Little recovery has been obtained, except in those instances where damages are accompanied by a physical trespass, or where Government immunities have been waived. Because the "discretionary function" exception was waived, this decision is admittedly rare and unlikely to recur. However, as the occurrence of sonic booms (with their accompanying vibrations, noise and shock waves) increases, many courts have expressed dissatisfaction with the present situation and declared a need for some form of recompense.[24] A suggested answer is strict liability; the Government is carrying on an activity from which damages will result, yet continues it. It seems only fitting that such conduct should bear the cost of its consequences.[25]

Joe W. Sheehan

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during 1962 [Emphasis added.].

Although the court did not discuss the elements of negligence, it held that the deefndant was negligent. The duty and standard of conduct to be applied are those which are to be inferred from the term of negligence itself. W. PROSSER, LAW OF TORTS, § 53 (3d ed. 1964):

> In other words, "duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in the light of apparent risk.

Thus, what the court is saying is that because there is "no compelling necessity" to administer the flight tests in this particular area, the defendant's conduct became unreasonable in light of the apparent risk of sonic boom damages. The court rejected defendant's claim that there was a lack of scientific cause and pointed out that the legal or proximate cause is not limited to the scientific cause but more inclusive, for it is the "efficient cause, or the one which necessarily sets in operation the factors which accomplish the damage." The court considered the damages to have been sufficiently established to justify an award in the amount of $750.

[24] Batten v. United States, 306 F.2d 580, 585 (10th Cir. 1962); Wallace v. United States, 142 F.2d 240, 243 (2d Cir. 1944).

[25] Such has been the theory applied where ultrahazardous activities are carried on. RESTATEMENT OF TORTS §§ 519-20 (1934); W. PROSSER, LAW OF TORTS § 77 (3d ed. 1964).

RECENT DECISIONS

DOMESTIC

Insurance — Exclusion of Risk Clause — Recovery

Plaintiffs who are beneficiaries of a life insurance policy brought suit against the defendant insurer who refused to pay the proceeds of the policy. Plaintiff's decedent was a pilot on a routine training flight for the Florida Air National Guard when his aircraft went into an uncontrollable spin and he was forced to bail out over the Atlantic Ocean. Sometime during descent or after entering the water the pilot became entangled in the shroud lines of his parachute and in the attempt to free himself caused his life preserver to move from its normal position to a position which caused him extreme difficulty in raising his head above the surface of the water, which difficulty resulted in his drowning. The insurance policy had a provision which excluded recovery if death was the result "from travel or flight in, or descent from or with, any kind of aircraft aboard which the insured is a pilot or member of the crew."[1] *Held, Affirmed*: The pilot's death resulted from the risk of flight which was excluded by the aviation exclusion clause of his insurance policy. *Elliott v. Massachusetts Mut. Life Ins. Co.*, 10 Av. Cas. ¶ 17,644 (5th Cir. 1968).

The trial court in the present case interpreted the exclusion clause as excluding recovery for death resulting from an aircraft flight. The court here said that the pilot's death "was not an independent cause but a link in the unbroken chain of causation."[2] Recovery under an insurance policy with a clause to exclude the risk of aviation has been wide and varied, since most of them appear to rest on the wording of the clause in relation to the facts of a particular situation. One case has held that the insurance company must prove that death resulted from an aviation hazard and where it failed to disprove that the death resulted from causes other than aviation, the insured was allowed to recover.[3] Another case has allowed recovery where the death of the insured could not be connected with the flight of the aircraft other than carrying him to the place where his death resulted,[4] and still another allowed recovery when it was shown that the death was not connected directly or indirectly with the deceased's flight in the aircraft.[5] In *Hobbs v. Franklin Life Ins. Co.*, it was held that if death results from an injury sustained due to the deceased having "been in or on a vehicle or device for aerial navigation" that he could not recover.[6]

[1] Elliott v. Massachusetts Mut. Life Ins. Co., 10 Av. Cas. ¶ 17,644 (5th Cir. 1968).
[2] 10 Av. Cas. at ¶ 17,648.
[3] Massachusetts Mut. Life Ins. Co. v. Smith, 193 F.2d 511 (5th Cir. 1951), *reh. denied*, 194 F.2d 1006 (5th Cir. 1952).
[4] Bull v. Sun Life Assur. Co., 141 F.2d 456 (7th Cir. 1944).
[5] McDaniel v. Standard Acc. Ins. Co., 221 F.2d 171 (7th Cir. 1955).
[6] Hobbs v. Franklin Life Ins. Co., 253 F.2d 591, 593 (5th Cir. 1958).

As demonstrated by this sample of decisions, no set rules can be laid down to determine recovery when an insurance policy contains a clause excluding the aviation risk.

L.R.J., Jr.

Torts — Slip and Fall — Contributory Negligence

Plaintiff went to Kennedy International Airport to see her husband off and was caught in an unruly crowd in which "there was a great deal of pushing and shoving." Because she read no English, she disregarded a warning sign on a door leading to a stairway to the flight field; on the stairway she was knocked down by the crowd and sustained personal injuries. Contending that she was an invitee and not a trespasser, she sued the Port of New York Authority. *Held, Complaint dismissed*: Plaintiff failed to sustain her burden of proving that she was not guilty of contributory negligence. *Varadi v. Port of N.Y. Authority*, 10 Av. Cas. ¶ 17,669 (N.Y.S. Ct. 1968).

The defendants may rely on testimony other than that of the plaintiff herself to show that she was guilty of negligence proximately contributing to the accident. Here, the evidence showed that the "pushing and shoving" was continuous, that plaintiff's daughter recognized it as a "dangerous situation," and that plaintiff was on the outside of the crowd. Because she chose not to take advantage of her opportunity to escape from the mob, she was guilty of contributory negligence.

D.M.E.

Torts — Airport Authority — Independent Corporate Entity

An action was brought for personal injuries, sustained on 28 May 1965 in the crash of a private aircraft, against the City of Imperial, Nebraska and the operator of the airport authority for the alleged commission of negligent acts. Defendant City of Imperial answered that on 11 April 1960, under the authorization of the Cities Airport Authorities Act,[1] the city created the Airport Authority, which was vested with the sole and exclusive jurisdiction and authority over the airport and its operation and maintenance. The motion for summary judgment of the City of Imperial was sustained and plaintiff's petition dismissed. *Held, Affirmed*: "[A]n airport authority, duly created by a city under the Cities Airport Authorities Act, is a supplementary, separate, and independent public corporation, and the parent municipal corporation is not liable for the torts of the authority." *Lock v. City of Imperial*, 10 Av. Cas. ¶ 17,691 (Neb. S. Ct. 1968).

[1] NEB. R.R.S. § 3-501, et. seq. (1943).

The Cities Airport Authorities Act provides that the authority is designed "a body corporate and politic constituting a public corporation and an agency of the city for which such board is established."[2] Such an Airport Authority has the power, among other things, to sue and be sued, have a seal and alter the same at pleasure, make bylaws for the management and regulation of affairs, issue bonds and levy taxes, contract with the creating city or any other political subdivision of the state and appoint officers and agents. Despite such apparent independence, plaintiff asserted that the authority was merely an agent of the city in the same sense as a municipal department, commission or board and that it was not merely an agency of the city but its controlled agent to the extent that the corporate veil and separate entity may be disregarded entirely as though the authority were simply the alter ego of the city.

In determining whether the state legislature intended to vest the normal corporate attributes and consequent limited liability of a creator in the city, the court examined the applicable legislation and concluded, "In no way does the act indicate any intention to disregard the corporate entity of an airport authority nor to constitute the supplementary public corporation an agent of the city for purposes of tort liability attribution."[3] Commenting on a governmental organization of similar structure, Roscoe Pound, in 1902, stated the principle upon which the instant decision is based. "As the Board was the creature of the statute, and exercised powers derived from the state, not from the city, we do not see how it can be said to represent the municipality so as to make the latter liable for its wrongful acts."[4]

M.E.D. Jr.

Inverse Condemnation — Damaging — Insufficient Cause of Action

In 1947, the plaintiff property owner purchased property adjacent to the defendant city's airport. Due to several extensions subsequent to this purchase, the runway now runs within several hundred feet of the plaintiff's house and the taxi apron for this runway is just opposite the house. The plaintiff suffered damage to her home having over twenty window panes broken by noise vibrations caused by aircraft warming up prior to take off. Plaintiffs also alleged that sleeping and conversation were impossible and that life in the house was unbearable. The defendant city argued that there were no direct overflights above the plaintiff's property and that there could not be a "taking" of the property otherwise. Therefore, the city demurred, stating that the plaintiff failed to state a cause of action in inverse condemnation. The trial court dismissed the demurrer to which

[2] NEB. R.R.S. §§ 3-501-514 (1943).
[3] 10 Av. Cas. at ¶ 17,692.
[4] Murray v. City of Omaha, 66 Neb. 279, 92 N.W. 299 (1902).

the city properly excepted and this appeal resulted on the question of whether or not the property owner had alleged a cause of action sufficient for a "taking" of property by inverse condemnation. *Held, overruled and remanded*: The property owner failed to state a cause of action in inverse condemnation for want of any claim for overflights, but a sufficient cause of action in nuisance was alleged in the plaintiff's writ and the case is to be remanded to be decided upon this ground. *Ferguson v. City of Kenne*, 238 A.2d 1 (N.H. Sup. Ct. 1968) (10 Av. Cas. ¶ 17,715).

The court considered the applicability of the inverse condemnation theory to the present situation and decided for several reasons that it was inapplicable. Foremost among these was the fact that no direct overflight occurred over the plaintiff's property and therefore the air space was not taken. A number of United States Supreme Court decisions[1] were analyzed and compared to decisions rendered by state courts,[2] which had granted relief to property owners in similar circumstances. The court reasoned that, like the Supreme Court's interpretation of the Fifth Amendment in the *Willow River* case, the New Hampshire Constitution limited it in granting relief to a "taking" of property, and "damaging" or "interference with the use" of such property did not constitute a "taking." The *Martin* case was distinguished on the ground that the Washington Constitution allowed recovery for either "taking" or "damaging." The court pointed out that in the only case in the federal courts to consider the instant issue, *Batten v. United States*,[3] the Tenth Circuit denied recovery because no overflights were made. Though the property owner was denied a recovery on the basis of a constitutional taking, the court found that her writ substantially set forth a cause of action based on nuisance and remanded on this point.

This unduly restrictive approach is attacked in a strong *dissent* wherein it is pointed out that precedent exists for allowing a recovery for a "taking" of property though no actual physical interjection is made upon the property.[4] The reliance by the court upon the *Willow River* case (which involved interference with an "economic use" rather than a "domestic use") and the *Batten* case (where no actual damage was done to the property, only windows were shaken and smoke blown across the premises, as opposed to twenty window panes being broken and sleep being rendered impossible in the present case) seems to be an overly conservative approach to the question in light of the *Eaton* precedent, set by this very court, and the standard of logic and fairness espoused by the Supreme Court in *Causby*.

E.G.S.

[1] Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); United States v. Willow River Power Co., 324 U.S. 499 (1944).

[2] Martin v. Port of Seattle, 391 P.2d 540 (Sup. Ct. Wash. 1964); Thornburg v. Port of Portland, 376 P.2d 100 (Sup. Ct. Ore. 1962).

[3] 306 F.2d 580 (10th Cir. 1962). In this case the nearest the runway ran to the property owner's house was 650 feet and most of the warmups occurred over 2000 feet from the house. In the present case the warmups were directly opposite and within several hundred feet of the plaintiff's home.

[4] Eaton v. Boston, C. & M. R.R., 51 N.H. 504, 3 Shirley (1872).

Torts — Federal Aviation Act of 1958 — Intrastate Flights Applicability

Suit was instituted by the Administrator of the estates of decedents who were killed in an airplane crash. The defendant owned an aircraft which had been rented to a duly licensed student pilot who, on the day of the crash, flew to a ranch in Texas where he picked up three passengers, although a licensed student pilot is not permitted to carry passengers. The four flew to another city in Texas, remained for a time, and took off again in the airplane which subsequently crashed. All were killed. The parties stipulated to the following facts: the Administrator was a citizen of New Mexico; the defendant was a resident of Texas; that the suit was brought under the Texas Death Statute; that the amount involved exceeded $10,000; that the pilot picked up the passengers without the owner's knowledge or consent; that the owner was not negligent in leasing the aircraft; and that the aircraft was in all respects airworthy. Plaintiff contended that the negligence of the student pilot should be imputed to the defendant because of Sec. 1301(26) of the U. S. Code. The defendant contended that the Texas Aeronautics Act, which defines "operation of aircraft" differently from the Federal Act, should be applicable.[1] *Held*: The Federal Aviation Act of 1958 applies to intrastate flights and the owner of a rented aircraft operated on an intrastate flight is engaged in the operation of an aircraft within the meaning of the Act. *Sosa v. Young Flying Serv.*, 10 Av. Cas. ¶ 17,671 (S.D. Tex. 1967).

In holding that the Federal Aviation Act of 1958 applied to intrastate flights, the court was of the opinion that, as the owner provision of the Texas statute had been taken out, one could conclude that the Texas statute was merely silent on the point of ownership liability, and that the state statute does not say that the owner shall not be liable. In fact, the court concluded, the state statute as it now reads shows a legislative intent to coordinate with the federal statute.

The court also reasoned that a Fifth Circuit case, *Hays v. Morgan*,[2] was authority for the instant decision. As the *Hays* court did not expressly find the federal statute exempting the liability of security owners in aircraft inapplicable because of the intrastate character of the flight, but based its decision on another point, the instant court's position was that

[1] "Operation of Aircraft" is defined in 49 U.S.C. § 1301(26) (1964) as follows:

> "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

The Texas Aeronautics Act defines, TEX. CIV. STAT. ANNOT. art. 46c-1 (1925), "operation of aircraft" as follows:

> "Operation of Aircraft" or "operate aircraft" means flight and use of aircraft for the purpose of air navigation, and includes the navigation or piloting of aircraft.

The Texas statute read at one time exactly like the federal statute. The "owner is engaged in the operation of aircraft" provision was deleted from the Texas statute by the state legislature in 1961.

[2] 221 F.2d 481 (5th Cir. 1955).

the Fifth Circuit had held the Federal Act applicable. However, it does seem possible that the Fifth Circuit opinion followed the well-known custom of federal courts, *viz.*, not deciding a federal question if the decision can be reached on another point.

The *Sosa* plaintiff and court refer to the liability of the owner as *absolute liability*. Surely this statement can be taken to mean that the owner will be fully liable to the extent of the damages cause by the proven negligence of the pilot and does not mean liability without proof of fault, the latter usually being the meaning ascribed to the term. The parties were given leave by the court to file an immediate appeal.

J.T.W.

Air Carrier — Acquistion — Antitrust Immunity

Butler Aviation Company petitioned for review of an order under Sec. 408 of the Federal Aviation Act of 1958,[1] approving the acquisition by Eastern Air Lines, Inc. (EAL) of all the stock of Remmert-Werner, Inc. (R-W) through issuance of its own stock. EAL and R-W intervened in support of the order. R-W is sales agent for an executive jet aircraft. The Civil Aeronautics Board had permitted the Examiner's initial decision to become effective without review and the Examiner declined to attach a condition, proposed by the Board's Bureau of Operating Rights, supported by Butler and accepted by EAL, that EAL should not claim antitrust immunity under Sec. 414 of the Act outside the field of transportation. *Held, petition denied*: An air carrier's acquisition of a fixed base operator that was also a sales agent for executive jet aircraft, while outside the field of air transportation, is within the antitrust immunity conferred by Sec. 414 of the Act, even though the immunity was not sought by the air carrier. *Butler Aviation Co. v. CAB*, 10 Av. Cas. ¶ 17,699 (2d Cir. 1968).

Section 408(a) of the Federal Aviation Act of 1958 includes acquisitions by air carriers of persons "engaged in any phase of aeronautics otherwise than as an air carrier." Section 408(b) contains a proviso prohibiting approval of any transaction "which would result in creating a monopoly or would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another carrier not a party . . . ." to the transaction. Though the proviso's mandate is sharp, the Board has escaped the straitjacket that would have been imposed by reading the proviso as a limit on its consideration of competition in passing on applications under Sec. 408, by concluding, in light of the immunity from the antitrust laws conferred by Sec. 414, that it must consider anti-competitive effects less extreme than those outlined in the proviso in determining whether the

[1] 72 Stat. 767, *as amended*, 74 Stat. 901, 49 U.S.C. § 1378 (1964).

transaction will "be consistent with the public interest" as defined in Sec. 102. The true construction of Sec. 408(b) as to transactions with anti-competitive effects is that the Board cannot approve a transaction if its effects will be so extreme as to violate the proviso but must approve others if, but only if, it finds the disadvantage of any curtailment of competition to be outweighed by "the advantages of improved service."[2]

In the instant case, denying the petition to review, the court used language confessing surprise at the Board's having declined review of the Examiner's initial decision, but reasoned that, literally, Sec. 414 is mandatory; that section states than any person affected by an order under Sec. 408 "shall be, and is hereby, relieved from the operations of the 'antitrust laws' . . . insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." Although one may readily agree that a person seeking approval under Sec. 408 is entitled to insist that the Board must accord the full benefits Congress directed if he meets the statutory tests, EAL did not so insist. The Examiner's statement "that the Board cannot require Eastern to waive the antitrust immunity conferred by Section 414," which at first blush may seem peculiar in that the Board should be required to thrust on EAL antitrust immunity it was willing not to achieve—especially in a field peripheral to the Board's primary concerns, was held by the court to reach the right result. The court read Sec. 414 and similar provisions in other statutes, such as Sec. 5(11) of the Interstate Commerce Act and Sec. 15 of the Shipping Act,[3] as declaring that in the areas there delineated the *public interest* demands that if a transaction has survived examination by the appropriate regulatory agency, antitrust peace shall prevail even if a party is willing to settle for less. A further reason for such a reading is that Congress—had it considered the matter—might well have wished to guard agencies against a subconscious temptation to neglect thorough assessment of anti-competitive considerations on the basis that the transaction would remain open to later attack by the Attorney General or in a private suit—remedies too slow and doubtful in these areas of particular public concern.

As said in *Pan American World Airways, Inc. v. United States*,[4] "It would be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. § 1486."

L. E. L.

Air Carriers — Free Passes — Liability Release

The plaintiff's husband is an employee of National Airlines. She was

[2] McLean Trucking Co. v. United States, 321 U.S. 67 (1944).

[3] *See also* final paragraph of Sec. 7 of the Clayton Act; *But see*, California v. FPC, 369 U.S. 482 (1962).

[4] 371 U.S. 296, 309 (1963).

riding with her three children on a free trip pass obtained from Northwest Airlines, although she had paid $45 to the airline. The plaintiff alleged that while she was on the aircraft she and her children were injured due to the negligence of the airline and further contended that the $45 service charge payment took her out of the class of gratuitous licensee and, in addition, that she had not signed the trip pass. *Held*: The plaintiff was a gratuitous licensee, to whom the carrier only owes the duty not to willfully or wantonly injure; hence the carrier was not liable. *Sims v. Northwest Airlines, Inc.*, 269 F. Supp. 272 (S.D. Fla. 1967).

The court held that the subject of free passes in interstate transportation is governed by federal law and statements contained in such free passes absolving the carrier from liability for ordinary negligence are valid. *Frances v. Southern Pac. R.R.*[1] applied this rule to railroads; *Braughton v. United Air Lines, Inc.*[2] applied the holding of *Frances* to airlines. By the Federal Aviation Act of 1958, Congress has pre-empted the field relating to airline passes; their effect is determined by federal, to the exclusion of state, law.

The *Sims* case is very similar to *Braughton*, where the Federal Court stated:

> In the absence of facts establishing gross or wanton negligence on the part of [the airline] . . . there can be no question but that the "conditions of contract" under which . . . a pass was issued to Mrs. Braughton exonerate [the airline] . . . from liability for any ordinary negligence claim alleged by plaintiff. . . .[3]

The court went on to analogize the $45 paid by plaintiff to the $9 paid by Mrs. Braughton and here, as in *Braughton*, found that the payment of a service charge did not make the pass anything other than a gratuitous one. So the only duty owed by the airline was not to willfully or wantonly injure plaintiff and her family while they were occupants of its airplane.

The argument that plaintiff did not sign the trip pass was discounted by the court in another railroad case analogy.[4] The court concluded that the failure of the passenger to sign the pass is immaterial when the pass is accepted and used.

F. J. C.

Carrier Liability — Judgment N.O.V. — Statutory Negligence

Action was brought for the death of two passengers who had hired an air-taxi owned and operated by defendants in Pennsylvania. The plane,

[1] 333 U.S. 445 (1948).
[2] 189 F. Supp. 137 (W.D. Mo. 1960).
[3] 189 F. Supp. at 141.
[4] Quimby v. Boston & M. R. R., 23 N.E. 205 (Mass. S. Ct. 1890).

which was not equipped for instrument flying under the applicable federal aviation rules, picked up the decedents at Washington National Airport but was unable to land at the passengers' intended destination because the field was closed by adverse weather conditions. The pilot then reported he was returning with his passengers to Pennsylvania where the visibility was also below minimum. The plane crashed shortly thereafter, while flying in zero visibility, into the side of Bald Eagle Mountain some 44° off course. Plaintiffs alleged pilot negligence for the violation of several applicable FAA regulations and the "highest standard of care" owed by a common carrier to its passengers. The defendant's evidence, mainly expert testimony, to dispute liability was fragmentary and speculative, yet by the Pennsylvania "oral testimony" rule the judge allowed the case to go to the jury and a verdict was returned for the defendants. On motion for judgment notwithstanding the verdict, *Held, motion granted*: Where a pilot of an air-taxi knew mountain territory well but crashed while the plane was in a condition of sustained level flight below minimum altitude levels required in a snowstorm so that the pilot was blinded, the pilot violated Federal Aviation Agency regulations pertaining to minimum flight altitude and such violation was negligence as a matter of law and was the proximate cause of the death of the passengers. *Gatenby v. Altoona Av. Corp.*, 268 F. Supp. 599 (W.D. Pa. 1967).

The court found that the consideration of plaintiffs' motion for Judgment N.O.V. is to be governed by the federal standards which provide that the court shall direct a verdict in favor of the party having the burden of proof, if the evidence established the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto.[1] It dismissed the Pennsylvania "oral evidence" rule, whereby it is the province of the jury in trespass cases, where oral testimony is concerned, to pass upon the credibility of witnesses, as a procedural rule confined in its application to cases where the evidence comes solely or largely from the oral testimony of an interested witness, the plaintiff himself. The purpose of the rule is to guide the trial court in determining whether there is an issue of fact to submit to the jury. The issue is credibility of the witness and where the issue is lacking, as where there is no reason to doubt his candor, then the reason for the rule falls. In the present case, no interested witness testified for the plaintiffs on the liability question; they were all dead. Testimony was all from independent witnesses, largely recounting physical facts, the existence of which was not disputed. The court concluded that it was not bound, under the *Erie* rule, to submit the issue of liability to a jury solely because of the "oral testimony" rule, if the evidence is otherwise conclusive.

In passing on plaintiffs' motion, the standard was applied that the evidence must be so overwhelming that once the fact in issue becomes inferable any other equally strong inferences are impossible.[2] Flying an aircraft

[1] Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958); Herron v. Southern Pac. R.R., 283 U.S. 91 (1931).

[2] Mihalchak v. American Dredging Co., 266 F.2d 875, 877 (3d Cir. 1959).

unequipped with deicing equipment into adverse weather conditions was found to be a violation of FAA regulations but there was no clear evidence that icing conditions were the cause of the crash. The Minimum Flight Altitude Rules[3] for day VFR flight were violated and because this statutory minimum standard of conduct was enacted for the purpose of avoiding the particular harm that ensued, the causal relationship of proximate cause was established.[4] The intent of these minimum flight rules is to prevent an airplane from crashing into obstacles in its line of flight; thus, violation of the altitude regulation was negligence as a matter of law and the legal cause of the resulting crash. Because the defendant was unable to controvert the physical evidence in this case, the motion for judgment notwithstanding the verdict was granted.

W.O.W.

[3] 14 C.F.R. §§ 75, 91.175 (1967). "Minimum flight altitude rules: Except during take off and landing, the flight altitude rules prescribed in paragraphs (a) and (b) of this section . . . shall govern air carrier operations. . . .

(a) Day VFR operation. No aircraft shall be flown at an altitude less than 500 feet above the surface or less than 1,000 feet from any mountain, hill, or other obstruction to flight.

(b) Night VFR or IFR operation. No aircraft shall be flown at an altitude less than 1,000 feet above the highest obstacle located within a horizontal distance of 5 miles from the center of the course intendent to be flown. . . ."

[4] 38 AM. JUR. *Negligence* § 160 (1938). "The statute itself charges one that its violation will result in an injury of the character sought to be prevented in its enactment. A statute having for its purpose the preservation of life and minimizing of personal injuries may impose a duty which is greater than the duty of ordinary care as such duty exists at common law, but a person who is charged by the statute with the necessity of exercising increased diligence must perform such duty or bear the consequences of his neglect."